

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 9185

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

DISTRICT OF COLUMBIA

408

MAX SILVERMAN,
Appellant,

vs.

OSBORNE REGISTER COMPANY, A CORPORATION,
Appellee.

**On Appeal from the District Court of the United States
for the District of Columbia**

*United States Court of Appeals
for the District of Columbia*

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United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9185

MAX SILVERMAN,
Appellant,

VS.

OSBORNE REGISTER COMPANY, A CORPORATION,
Appellee.

On Appeal from the District Court of the United States
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTION

This is an appeal from a judgment of the District Court of the United States for the District of Columbia, granting the motion of the appellee, Osborne Register Company, defendant below, for a summary judgment. Jurisdiction of this court is based on Section 17-101 of the D. C. Code (1940).

INTRODUCTORY STATEMENT

Appellant brought an action in the court below against the appellee for breach of contract arising out of appellee's failure to pay appellant monies due and owing to him under a contract of joint enterprise pursuant to which appellee contracted with the Federal Government to manufacture ration tokens for the Government's rationing program. (App. 1, 11). After the case was calendared for trial, but before the pretrial hearing, appellee moved for a summary judgment. The motion was heard below by Mr. Justice McGuire on the pleadings (App. 2-5), the deposition of the appellant taken for purposes of discovery, (App. 6-34) and appellant's affidavit (App. 36-40). After argument on the motion, the court below issued a Memorandum Opinion (App. 41), granting the motion and entered judgment for the appellee. (App. 42) Appellant then promptly appealed to this Court. (App. 42)

References in this brief to pages of the printed record, which is printed as a Joint Appendix to this brief, are made by the symbol "(App.....)".

STATEMENT OF CASE

Appellant was engaged in the business of supplying premiums to radio sponsors of nationally advertised goods (App. 12), and pins and emblems to such organizations as the American Red Cross, British War Relief Society and Office of Price Administration (App. 12, 13, 14, 19). From about June 1943, (App. 20) appellant worked constantly with Government representatives of the Office of Emergency Management, Office of Price Administration and War Production Board in connection with the development of information relative to the requirements to be

adopted by the Government for the manufacture of ration tokens for the national rationing program (App. 38) and the availability of acceptable materials for such manufacture. This work was performed by appellant in the belief he would personally bid for a contract for the manufacture of the required tokens which was to be awarded on competitive bidding. (App. 39) He spent all of his time and energy on it and neglected his other business completely while doing so. (App. 27)

On August 20, 1943, appellant made an arrangement with the appellee whereby the latter would manufacture the required ration tokens for him, and appellant himself was to bid on the token contract. (App. 11, 12, 39) On August 23, 1943, appellant, having just learned from representatives of the O.P.A. that he could not bid on the ration token contract because he did not own the factory in which the manufacturing was to be done, (App. 13, 39) communicated this information to the appellee and, at appellee's suggestion, the parties entered into an agreement that they would submit jointly a bid in appellee's name to the Office of Emergency Management in response to invitations to bid to be issued by that office, at a price to be fifteen percent above the price at which the appellee had theretofore agreed to manufacture the tokens for appellant as his sub-contractor (App. 14, 37-40). The bid price was the same as appellant intended to bid in his own name when it was contemplated that appellee would do the work as appellant's sub-contractor. (App. 39) It was also agreed that appellant was to receive from the profits arising out of the manufacturing contract an amount equal to fifteen percent of the quoted price to him, which was to compensate him for his expenses and his work and the balance was to be his profit. (App. 39)

Appellant and appellee continued to work together in the furtherance of their agreement and submitted a bid in appellee's name for the manufacturing contract. On

October 5, 1943, the day following the Government's opening of bids, appellee repudiated the agreement between the parties when it became known that said bid was the low bid. (App. 17, 18, 19, 22) The contract for the manufacture of the ration tokens was subsequently awarded to the appellee by the Office of Emergency Management on the basis of said bid, and substantial profits were realized therefrom. Appellant then brought his action below to recover his share of the profits as provided for in said agreement.

STATEMENT OF POINTS RELIED ON

1. The trial court erred in granting appellee's motion for summary judgment.
2. The trial court erred in ruling that the contract sued on was illegal and void on the ground of public policy.
3. The trial court erred in applying the principle of *Tool Co. v. Norris*, 2 Wall. 45.

SUMMARY OF ARGUMENT

The contract created a joint enterprise. By that creation the parties were able to consolidate their experience and facilities so as successfully to obtain the competitive award and to perform the Government contract for the manufacture of ration tokens. There is no illegality in a joint enterprise at a public bidding, notwithstanding the incidental effect of lessening of competition which results from the joinder of parties in bidding.

The contract was not one for the procurement of a Government contract on a contingent basis. The application by the lower court of that principle as announced in *Tool*

Co. v. Norris, 2 Wall. 45, was completely wrong. Even if it is assumed that the element of contingent compensation for procuring a Government contract is involved in the case at bar, the contract is legal and valid and is not against public policy because no improper or corrupt means were used or contemplated, and the contract itself was subject to award by competitive bidding.

The lower court erred in granting the motion for summary judgment on the theory that it involved contingent compensation for procuring a Government contract. In adopting that theory, the lower court failed to apply the proper rule of construction on a motion for summary judgment which required the deposition and affidavit to be construed favorably to the party opposing the motion. The lower court applied a rule of construction which was the complete opposite and, in effect, made findings contrary to the substantial, uncontradicted evidence supporting appellant's theory of the case. The lower court should have found that a joint enterprise was created by the contract and that it was valid and enforceable.

ARGUMENT

The Trial Court Erred In Granting Appellee's Motion For Summary Judgment

I

The contract between the parties created a joint enterprise

The agreement made between the parties is legally a joint enterprise or joint venture, wherein each incurred expense and contributed work, services and other essentials to permit the successful performance of a particular business purpose.

Under the contract appellant agreed to perform, at his own expense, such services as might be required to ascertain the existence of material which was either non-essential to the war effort or to develop the availability and practicability of other material which could be used effectively in the production of ration tokens by the appellee. He was also to obtain the necessary allocation of such material to the extent required for the manufacture of the ration tokens; to confer with government officials and to use his unusual experience in the type of work involved to settle all problems relating to the specifications to be made applicable, including the demonstration to the satisfaction of such officials that vulcanized fiber was in fact the best material to use and that its use would be to the public's interest; to arrange with Government officials for the approval of appellee's facilities to be used in manufacturing the product; and otherwise to establish the appellee's qualifications to assume a contract for the manufacture of the product in the quantity and within the time fixed by O.P.A. (App. 37) Appellee was to submit to the Government a joint bid in its name for the manufacture of the ration tokens out of vulcanized fiber or other extruded material, and perform the manufacturing for appellant and itself. (App. 14, 37) Factually and legally the parties became joint enterprisers for the purpose of bidding and performing any contract that might result therefrom. .

It should also be noted that appellant originally intended to bid in his own name and make his usual arrangement with the appellee for the necessary manufacturing, in quite the same manner as appellee had frequently acted as appellant's sub-contractor. (App. 11, 39, 40) However, about August 23, 1943, appellant was informed that only those concerns that owned their own plants would be invited to bid. (App. 13, 39) Thereupon, in order to avail itself of the knowledge and experience acquired by ap-

pellant and in order to have his further services, counsel and assistance in developing the ration token project, appellant suggested to him that, instead of appellant using appellee's facilities in the manufacture of the ration tokens and bidding on the contract for himself, and since the appellee had the facilities and had already agreed to manufacture the tokens for appellant, a joint bid should be submitted by the appellant and appellee in the latter's name, the appellant to continue to perform the same duties as though he were bidding himself. (App. 11, 39) The agreement to join in bidding in the name of one of the parties was reasonable, honest and was for a legitimate purpose. It was contended below that the agreement had the effect of stifling competition and was, therefore, illegal. That contention disregards the undisputed facts, and is based on the assumption that the primary object of the agreement was to stifle competition. The record plainly disavows any such purpose and does not permit an inference to that effect to be drawn. The agreement between the parties was prompted only by the fact that appellant had become disqualified to bid in his own name because of the Government's adoption of a policy that the bidder had to be the owner of the facilities to be used in manufacturing. It is readily apparent that, because of appellant's disqualification to bid in his own name, the entire contention that the agreement prevented him from submitting a personal bid must fail. It is far too hypothetical to urge, as appellee urged below, that appellant, in consideration of the agreement, gave up any right he had to buy a plant and then submit a bid in his own name. It is undoubtedly possible that appellant might have built or rented a plant and thus may possibly have qualified himself to bid. But it became unnecessary for him to consider the possibility of doing so when appellee proposed the joint venture agreement. The record shows that when appellant was notified of his disqualification to bid he

promptly informed the appellee and the latter agreed with him to submit the bid in its name. (App. 14)

In the case of *Berg v. Plitt*, 178 Md. 155, 12 A.(2d) 609, 614, the Court of Appeals of Maryland clearly stated the applicable rule of law, as follows:

“ the mere combination of several persons for the purpose of having one of the group bid for property offered for sale at a public auction for the joint account of all the members, is neither void nor voidable, unless it is designed to suppress bidding in order that the property offered will be sold at a lower price than it would probably bring at an honest sale, or is otherwise fraudulent, and whether in a given case that intent may be found, is ordinarily a jury question.”

That court also quoted from the decision of the Supreme Court of West Virginia in the case of *Coal & Coke Railway Company v. Marple*, 73 S.E. 261, as follows:

“ . . the great majority of the cases hold that the mere combination does not of itself amount to such fraud as to render the contract unenforceable as between the parties; or to constitute grounds to set aside the sale. Numerous early decisions holding the mere combination of itself fraudulent and as ground for setting aside the sale have been overruled.”

In *McCausey v. Burnet*, 60 App. D. C. 201, 50 F. (2d) 491, this Court described a “syndicate” as a “joint adventure” and defined the latter to be a “special combination of two or more persons, where in some specific venture a profit is jointly sought without any actual partnership or corporate designation.”

The relationship of joint venturers or joint enterprisers is similar to that of a partnership and is governed by partnership law. While the term partnership generally characterizes a general and continuing venture, a joint enterprise designates a single venture in one transaction. It is not necessary to constitute a joint enterprise that the parties furnish capital or services in equal amount. If

they agree what each is to do or contribute and agree on the sharing of profits in a particular venture, a joint enterprise is created.

Kasishke v. Baker, 146 F. (2d) 113

Aiken v. Mills, 144 F. (2d) 23

Motter v. Smyth, 77 F. (2d) 77

Dexter & Carpenter v. Houston, 20 F. (2d) 647

In re Asiatic Exploration, 41 F. (2d) 230

Annotation 63 A.L.R. 909

The relationship between joint enterprisers is fiduciary in character.

Ferguson v. Bateman, 1 App. D.C. 279

Driver v. Brunemer, 40 App. D.C. 105

Chapman v. Dwyer, 40 F. (2d) 468

Hey v. Duncan, 13 F. (2d) 794

Fitch v. Ingalls, 271 Mass. 121, 170 N.E. 833

In *Whitely v. Schoenlein*, 183 Md. 590, 39 A.(2d) 692, plaintiff and defendant entered into an agreement whereby the latter was to attend an auction sale at which real estate consisting of partially constructed buildings was to be sold at foreclosure. Defendant was to bid up to the amount of the mortgage and furnish the capital necessary to complete building operations. Plaintiff was to perform the work necessary to complete the buildings and profits were to be divided equally. Defendant's bid was successful and plaintiff then performed the work necessary to complete the buildings and arranged for their sale. After the sales were made defendant refused to give an accounting of the profits. Defendant's demurrer to the complaint was overruled and on defendant's appeal the decision was affirmed. The Court held that a joint enterprise existed and that plaintiff was entitled to recover after an accounting was held.

The leading authority on the right of persons to enter into a joint venture for the purpose of bidding, one of whom is to do the bidding for the benefit of both, and where

the defense of illegality was urged, is *Carp v. Kaplan*, 251 Mass. 225, 146 N.E. 779. In that case, defendant asked plaintiff if he were interested in buying two hundred thousand overseas caps to be offered at a government auction of surplus goods. They agreed that the defendant would buy them at the sale and give plaintiff one hundred thousand at cost, and plaintiff would refrain from bidding. Defendant bought the entire lot and later refused to give plaintiff the one hundred thousand caps. Plaintiff sued for breach of contract and recovered, the court holding that the agreement of joint venture was entirely legal and enforceable because it was entered into for an honest and reasonable purpose.

5 *Williston on Contracts* (Rev. Ed), Section 1663.

Restatement of the Law of Contracts, Section 517

Although it is well settled that an agreement between contractors bidding for public work which tends to stifle competition is against public policy, it is equally well settled that such agreement is valid and enforceable if neither alone could have accomplished the object in his individual capacity notwithstanding that the incidental effect is to lessen competition.

Hyer v. Richmond Traction Co., 168 U.S. 471, 42 L.ed. 547

Hegness v. Chilberg, 224 F. 28

In *Hyer v. Richmond Traction Co.*, *supra.*, plaintiff and defendant had separately negotiated with the city for a street railway franchise and then agreed to cooperate so as jointly to obtain the franchise and to divide equally the profits. The defendant obtained the franchise in its name and later refused to recognize plaintiff's one-half interest. In holding that plaintiff was entitled to recover at law, the Supreme Court said:

"As said by the New York court of appeals in *Atcheson v. Mallon*, 43 N.Y. 147, 151: 'A joint proposal, the result of honest cooperation, though it might pre-

vent the rivalry of the parties and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and avowed, and not secret. The risk, as well as the profit, is joint and openly assumed. The public may obtain at least the benefit of the joint responsibility, and the joint ability to do the service. The public agents know, then, all that there is in the transaction, and can more justly estimate the motives of the bidders and weigh the merits of the bid.' . . . It may be noticed that there is nothing in the agreement reduced to writing, or as interpreted by the facts stated, which tends to show any thought or purpose of using corrupt or improper influences to secure the action of the city council. So that, upon the record as it stands, the question is, narrowly, whether any agreement to unite between parties who have applied, or contemplate application, for a franchise is, under all circumstances, necessarily void as against public policy.

"The case is also easily distinguishable from those contracts merely to abstain from bidding. An agreement not to bid tends to diminish the number of bidders and thus prima facie to lessen the probable profitability of the sale or contract. Yet, even in cases of public sales, the rule laid down by this court is that agreements to unite in a bidding are not per se void. Some other element than the mere fact of union must exist before the agreement is to be condemned. *Kearney v. Taylor*, 15 How. 494, 14 L.ed. 787. . .

"The observations thus made show that every case must be determined upon its peculiar facts and circumstances, and the courts, before condemning an agreement to unite in a bid, must see that the agreement is such as really destroys the value of competitive bidding. . . ."

Atcheson v. Mallon, 43 N. Y. 151

Ferrell v. Elkins, 159 Ark. 31, 251 S.W. 380

Whalen v. Brennan, 34 Neb. 129, 51 N.W. 759

Accordingly the contract upon which appellant's action is based created a joint enterprise and was valid and enforceable.

II

*Contingent Fee Contracts to Procure Government
Contracts are not Illegal Per Se*

Of the profits of the joint venture, appellant was to receive an amount equal to that which he would have received had he himself bid and had the appellee acted as his subcontractor in manufacturing the tokens for him in accordance with their earlier contemplation. (App. 40)

There is nothing in the record which remotely indicates that appellant's participation in the profits from the contract was for services in getting it awarded to the appellee. The contract was not a contract to secure "favor legislation" or to procure an award of a Government contract. Nor could such contention be entertained, since the award by the Government of the ration token contract was by competitive bidding.

In order to assume that the contract had any semblance of contingent compensation for services in procuring a Government contract, it would be necessary completely to ignore

(a) the material facts which establish that appellant and appellee were joint enterprisers jointly bidding for the contract in appellee's name;

(b) that appellant's interest in the contract was based on a valid consideration of substantial and valuable services which had no relation to "procuring a government contract", with the sinister implications frequently attributed to such conduct; and

(c) that the contract to be awarded by the Government was to result from competitive bidding.

Assuming that such facts are ignored, and they must have been ignored below to support the reasoning of the Mem-

orandum Opinion, even then, there is no illegality in the contract upon which appellant bases his claim.

There is no rule of law which makes it illegal to contract for services on a contingent basis for the procurement of a Government contract where the services relate to the sale of goods or supplies to the Government and do not involve the use of personal influence or other illegitimate means. Where the services require one to confer with Government officials and to inform them of the merits of the seller's product or capacity to perform, so as to enable such officials to act for the best public interest, the contract for such services is valid and enforceable. In 12 *Am. Jur.*, Section 207, the following is stated:

“Because of their baneful tendency, agreements by which persons are employed for a compensation contingent upon success, to secure contracts, concessions, etc., from the government, or to procure some action on the part of administrative or executive officers of the government have been declared void by some leading authorities, without any inquiry as to whether personal solicitation or personal influence were intended to be, or were in fact, a factor in the attainment of the desired end. However, the more generally accepted view is that an agreement of employment in which compensation is contingent upon success in securing contracts, concessions, etc., from the government through its officers is not illegal merely because of the character of the compensation.”

Commission compensation for obtaining a Government contract based on such services rendered by legitimate means is not frowned upon by the courts, but is approved on the theory that it enables officials charged with the responsibility of purchasing for the Government to become fully cognizant of the advantages of the product of the party represented and enable such officials to act for the best public interests.

Lewy v. Standard Plunger Elevator Co., 218 Ill. App. 306, affirmed in 296 Ill. 295, 129 N.E. 775

This practice was favorably recognized by the Supreme Court of the United States in the case of *Oscanyan v. Winchester Repeating Arms Co.*, 103 U.S. 261, 26 L. ed. 539, and has been followed by it in its later decisions. In that case the Supreme Court said: (p. 275)

“So, too, with reference to furnishing the government with arms or supplies of any kind. It is legitimate to lay before the officers authorized to contract, all such information as may apprise them of the character and value of the articles offered, and enable them to act for the best interest of the country. And for such services compensation may be had for similar services with private parties either on a quantum meruit, or, where a sale is effected, by the ordinary brokerage commission. And here it may be observed, in answer to some authorities cited, that the percentage allowed by the established custom of commission merchants and brokers, though dependent upon sales made, is not regarded as contingent compensation in the obnoxious sense of that term, which has been so often the subject of animadversion by this court, as suggesting the use of sinister or corrupt means for accomplishing a desired end. They are the rates established by merchants for legitimate services in the regular course of business.”

The court below, in granting appellee's motion for summary judgment, ruled that the 'general principle laid down broadly in (*Providence*) *Tool Co. v. Norris*, 2 Wall, 45, 54, is applicable.' The broad principle announced by the Supreme Court in that case was that an agreement for compensation to procure a contract from the Government could not be enforced, irrespective of whether improper means were used in procuring it. That case presented the very first expression by the Supreme Court concerning contracts of that nature. The Supreme Court, however, in later considering the legality of similar contracts, recog-

nized that the language used in that case was much too broad, and its later decisions properly limited the broad proposition first announced.

Oscanyan v. Winchester Repeating Arms Co., supra
Nutt v. Knut, 200 U.S. 12, 50 L.ed. 348

Parish v. Mac Veagh, 214 U.S. 124, 132, 137, 53 L.ed. 936

McGowan v. Parish, 237 U.S. 285, 59 L.ed. 955

Capital Trust Co. v. Calhoun, 250 U.S. 208, 217, 63 L.ed 942

Steele v. Drummond, 275 U.S. 199, 72 L.ed. 238

A good example of such limitation is *Steele v. Drummond*, supra, where the principle of the *Tool Company* case, that it is immaterial whether "improper means are contemplated or used", was disclaimed and the more realistic doctrine adopted that public policy objections to such agreements should not be presumed where nothing sinister or improper is done or contemplated. The Supreme Court there said, at page 205:

"And it is a matter of great public concern that freedom of contract be not lightly interfered with. *Baltimore & O. S.W.R. Co. v. Voigt* 176 U. S. 498, 505. The meaning of the phrase 'public policy' is vague and variable; there are no fixed rules by which to determine what it is. It has never been defined by the courts, but has been left loose and free of definition, in the same manner as fraud. . . .

It is only in clear cases that contracts will be held void. The principle must be cautiously applied to guard against confusion and injustice. . . . Detriment to the public interest will not be presumed where nothing sinister or improper is done or contemplated."

(Italics supplied)

The most careful scrutiny and unfavorable interpretation of the appellant's testimony will neither justify nor support a presumption that the contract between the par-

ties hereto was detrimental to the public interest. Nothing sinister was done or contemplated by either party in seeking the ration token contract according to the pleadings, deposition and affidavit, and no such contention was made in the court below.

See:

Black & White Taxicab Co. v. Brown & Yellow Taxicab Co. 276 U. S. 518, 72 L.ed. 681

This court has also had occasion to consider the scope and import of the decisions in the *Tool Company* and *Oscanyan* cases in the case of *Hanger, Inc. v. Fitzsimmons*, 50 App. D.C. 384, 273 F. 348, where the contract was for the services of an agent in making sales to a foreign government. Referring to the *Oscanyan* case, which had already limited the principle announced in the *Tool Company* case, this court said:

“We think counsel have misconceived the scope of the *Oscanyan v. Arms Co.*, 103 U.S. 261, 26 L.ed. 539, cited by them. There an attempt was made, by an official of a foreign government, to recover upon a contract for the personal influence of that official with another official of his government. The court characterized that contract as corrupt in its origin and tendencies. Here, however, the contract on its face is legitimate and free from all taint or suspicion, for it simply provides for the services of an agent, and the evidence is in harmony with the term of the contract. . . . The only influence contemplated by the contract was the proper influence of a salesman.”

In *Noonan v. Gilbert* 63 App. D.C. 30, 68 F(2d) 775, a contract between an attorney and client for legal services before a legislative body, in which compensation was contingent upon success in procuring the passage of legislation, was held contrary to public policy. In that case this court relied upon both the *Tool Company* and *Oscanyan* cases and held the contract void because it had a tendency to be corrupt. However, that case is distinguishable on the

ground that it involved the procurement of "favor legislation", as distinguished from normal sales activities and the consideration therefor was "concentrating influence".

The distinction which is inherent in a comparison of *Hanger, Inc. v. Fitzsimmons, supra*, and *Noonan v. Gilbert, supra*, was either not recognized or not followed by the court below.

The same distinction is applicable in considering the last announcement of this court in *Brown v. Gesellschaft Fur Drahtlose*, 70 App. D.C. 94, 104 F(2d) 222, where a contract between attorney and client was held against public policy because it was based upon the client's success in procuring favor legislation.

It is well established law that, until the contrary is clearly shown, the law presumes that the parties to a contract intended to accomplish a legal purpose. It is equally well established that contracts will not be declared void on public policy grounds except in cases free from doubt. In such cases real prejudice to the public interest must be affirmatively shown. No authorities are necessary to be cited for these propositions.

The Restatement of the Law of Contracts, Section 562, relating to "Bargains for Procuring Public Contracts" states as follows:

"A bargain to endeavor to secure a government contract by presenting to the official having power to make the contract inducements except such as relate to the desirability on public grounds of entering into the contract, is illegal; but if no influence other than those are bargained for, or contemplated, the bargain is not illegal."

The second illustration under that section reads as follows:

"A, a manufacturer of goods, agrees with B to pay him a commission for all contracts that B can procure

for purchase of goods of A's manufacture. . . . If no influence of a personal nature is bargained for or contemplated, the agreement is not illegal."

Section 563 of the Restatement relates to the contingent nature of the compensation, and states:

"The fact that the compensation fixed in a bargain for efforts to secure legislation or official action is contingent on success, is not conclusive evidence that improper means are contemplated in securing the desired results."

Hosack v. Taylor Bros., 15 A. (2d) 489

Presumably, the contingent nature of the compensation would be just one factor, to be considered with all other evidence, in determining an issue as to whether improper means were used or contemplated.

In *Valdes v. Larrinaga*, 233 U.S. 705, 58 L.ed. 1163, the Supreme Court upheld the validity of a contract somewhat similar to the one here involved. There the plaintiff was to receive a ten percent interest in the concession by the Government to a riparian owner of the right to utilize water power in developing electricity. Plaintiff's interest was based on his agreement to take the necessary steps to present the matter to the Secretary of War and to the Military Government of Puerto Rico, including the submission of plans, specifications and other technical data. The marked factual similarity of that case would appear to make the decision in that case authoritative here.

The question of the validity and enforceability of contingent fee contracts for obtaining Government contracts has arisen on several occasions in various state courts. The Supreme Judicial Court of Massachusetts, in the case of *Noble v. Mead-Morrison Mfg. Co.*, 237 Mass. 5, 129 N.E. 669, holding a contingent fee contract for the sale of ammunition to the British to be legal, said:

“It is plain from the facts disclosed in *Tool Co. v. Norris* . . . that Norris contracted solely for ‘concentrating influences at the war department’ through senators and other persons supposed to possess it for the purpose of procuring a contract for supplying fire-arms to the government, and that that was the single object of his exertions. Manifestly, that contract was flagitiously illegal, both on its face and in the means naturally, and in truth intended, to be used in its performance.”

The Supreme Court of Alabama, in the case of *Anderson v. Blair*, 202 Ala. 209, 80 So. 31, held that an agreement between plaintiff and defendant to use their joint efforts to obtain a Government contract for the construction of a military camp in which they were to contribute services and share in the profit after the contract was obtained, was a valid agreement. That court said:

“Appellee lays stress upon the decision in *Tool Co. v. Norris*, 2 Wall. 45, 17 L.ed. 868. In that case the court made use of this very broad expression: ‘All agreements for pecuniary considerations to control the business operations of the Government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy.’ In *Lyon v. Mitchell*, 36 N. Y. 235, 93 Am. Dec. 502, Judge Hunt, afterwards on the bench of the Supreme Court of the United States, expressed the opinion that the Tool Company case was not well considered, and in *Bush v. Russell*, supra, we indulged quotations from later decisions of the Supreme Court of the United States which very clearly demonstrated that the language of the Tool Company case was too broad, and that it is legitimate to employ agents to lay before officers authorized to contract for government all such information as may apprise them of the character and value of the articles offered, and enable them to act for the best interest of the country . . . agreements to procure Government contracts by ‘lobbying’, that is, by secret and corrupting influences, or by personal influence, are void as against public policy; but, where the contract evi-

dences a purpose to engage in a fair business enterprise and there is no concealment of the agency, it is good and should be enforced.”

In *Swift v. Aspell & Co.*, 82 N.Y.S. 659, 660, the following appears:

“A person having something to sell has the right to sell it through an agent, and this right is an incident to his ownership. To declare that he may not employ any agent, upon commission, where the Government is the prospective buyer, is to take away what is ordinarily one of the elements of the enjoyment of ownership—the unrestricted right to sell. Upon this line of reasoning, commission agreements for a sale to the Government have been upheld and enforced in this state where the agreement did not actively require corruption in its performance. *Treated as a matter distinct in its nature from an agreement to procure legislation, an agreement to compensate an agent for his successful efforts in traffic with the government has been held binding, where unfairness in the dealings or an intention to resort to corruption did not actually appear from the facts.*” (Italics supplied)

In *Houlton v. Nichol*, 93 Wis. 393, 67 N.W. 715, it was said that when the Supreme Court in the *Tool Company* case said that the law looked to the tendency of agreements for contingent compensation and closed the door of the courts to them, it referred to agreements the performance of which contemplated a resort to methods having a corrupting tendency and nothing more.

In *Hall v. Anderson*, 18 Wash. (2d) 625, 140 Pac. (2d) 266, the client employed an attorney to persuade the War Department to award the client a contract for the construction of a Government hospital. The client submitted his bid in conformity with an invitation to bid, which contained a provision prohibiting the payment of any contingent fee or commission to anyone for obtaining the contract. The court held that the contract between the client and his attorney, providing for the payment of a fee based upon a

certain percentage of the bid only if the attorney succeeded in procuring the contract, was not void as a matter of law, and said:

“It will not do to hold that public policy forbids one to employ an agent to represent him in dealing with the government when, as far as the facts show, the employment contemplates an appeal to the government agency on the merits, as distinguished from the use of some species of direct or oblique personal influence.”

Also, the Annotation in 46 A.L.R. 203, says:

“The more generally accepted view, and, it is submitted, the correct one, is that a contract of employment in which compensation is contingent upon success in securing contracts, concessions, etc., from the government through its officers, is not on its face void because of the character of the compensation.”

See also:

Old Dominion Transp. Co. v. Hamilton, 146 Va. 594, 131 S.E. 850

Bergen v. Frisbie, 125 Cal. 168, 57 P. 784

Stansell v. Roach, 147 Tenn. 183, 246 S.W. 520

Williams v. Cave, 138 Kan. 586, 27 P(2d) 272

Beck v. Bauman, 175 N.Y.S. 881

Frenkil v. Hagan, 146 Md. 94, 125 A. 909

In *Printing Company v. Sampson*, L. R. 19 *Equity Cases* 462, Sir George Jessel, M. R. said:

“It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred, and shall be enforced by courts of justice.”

The foregoing discussion of the authorities bearing on the question of the legality of a contract providing for com-

pensation contingent upon securing a Government contract is presented because of the lower court's reliance on the *Tool Company* case, and since that was the point upon which the decision below was based. The discussion is not presented because appellant believes the principle to be applicable to the case at bar. The contract involved here was one which created a joint venture, and the *Tool Company* case is clearly inapplicable. Even if the doctrine of that case were applied here to test the validity of the contract, it has been shown that, according to the authorities more recent than the *Tool Company* case, the contract is valid and not illegal.

At the time the agreement between appellant and appellee was made, appellee had no intention of bidding on the ration token contract. It had only done, what was the usual practice between the parties, i.e., quote a price to the appellant as to what it would charge the appellant to manufacture the tokens for him as his subcontractor if he obtained the contract himself. The fifteen percent which the appellant was to receive from the profits of the joint enterprise was to be his share in the profits of the venture, and according to appellant's testimony, the amount of the proposed joint bid which appellee was to submit to the Government was to be determined by adding fifteen percent to the price it had theretofore quoted to appellant. (App. 14,37)

The appellee had none of the selling and administrative departments to perform the type of service appellant was accustomed to perform, and which he performed for appellee. The fifteen percent allowance to appellant would have left the appellee in the same financial position as if it had manufactured the tokens for appellant as originally expected, and, accordingly, added nothing to the cost to the Government. (App. 40) Appellee not only did not have an organization equipped to perform the services appellant performed, but if it had tried to establish such an organization it could not have functioned in time to have

bid on the Government contract and the costs would have been disproportionate to the defendant's normal business volume. It was accordingly to the mutual advantage of both parties to join in the bidding, otherwise there would have been no bid from either party.

The trial court, completely ignoring the value of the services that appellant rendered to the joint venture and which made the bid possible, ruled that the contract had the tendency "to have the government pay fifteen percent more than it would presumably have paid under the circumstances", and therefore concluded that the contract was void and illegal on the ground of public policy. (App. 41)

There is no principle of law which declares that an agreement which has the tendency of adding to the cost of a government contract is illegal. There are no authorities which support that rather novel theory which appellant urged below and which the lower court apparently adopted. Prime contractors with the Government enter into agreements of all kinds which have the effect of increasing the cost of performing contracts, and such agreements are never held invalid because of their incidental effect of increasing the cost of performing a contract with the Government.

Notwithstanding the ruling of the trial court, appellant's contract did not in fact tend to increase the cost to the Government for the tokens manufactured by the appellee. Appellant gave valuable services for his interest in the joint venture—services vital to the development of the various factors entering into the successful manufacture of the ration tokens. His share of the profits was legitimate. Compensation to him for his services was a legitimate item of expense and would have been included in the ordinary cost sheet had appellee employed appellant as part of its organization regularly to perform services of the nature which he performed instead of making the joint venture agreement. The dominant fact of the whole case

is that, had appellant not been disqualified to bid in his own name because of his lack of manufacturing facilities, appellee would have been appellant's subcontractor, and the cost to the Government would have been the identical amount which the Government paid the appellee. (App. 40)

In none of the cases involving the question of the legality of a contingent fee or commission arrangement for services rendered in connection with the procurement of a Government contract has the Supreme Court given consideration to alleged illegality based on cost. Services rendered by an agent in representing his principal before the Government necessarily adds to the cost of every contract, to the extent of his salary or commission and expenses. But, never has a contract been held void as against public policy merely because of the cost factor.

There is nothing in appellant's deposition from which it can be inferred that his share of the profits was compensation for procuring the contract. The award of the contract was based on competitive bidding. Appellant's participation in the profits arising from the contract was based on the following summary of services which he performed for the common interest of the parties and for their mutual benefit: (App. 37)

Ascertaining the existence of a material which was non-essential to the war effort and which could be used effectively and economically in the production of ration tokens, and to obtain the necessary allocation of such material to the extent required for the manufacture of the product;

Conferring with Government officials who had charge of the selection of the type of material to be used, the design of the ration token and control of the various materials which might be adaptable to their manufacture;

Arranging with the proper Government officials for the approval of appellee's facilities to be used in the

manufacture of the product in the time and quantity required by the exigencies of the national rationing program;

Assisting the appellee generally in obtaining priorities and allocations of equipment and materials, required to complete the contract, in the event a contract was awarded on the bid.

There was nothing in these services performed by appellant, or in the contract for them, which contemplated anything corrupt, sinister or improper, even if it is assumed that the contract was not a joint venture agreement but one relating to the procurement of a Government contract. Any contention that corruptness must be implied from the element of contingency is unsound both morally and legally. Further, the legal presumption is to the contrary.

III

The Court Below Did Not Apply the Proper Rule of Construction

In the Memorandum Opinion the court below said:
 "There being, therefore, no real genuine issue of fact, a Motion for Summary Judgment will properly lie."
 (App. 41)

Appellee based its motion on the discovery deposition which it took of the appellant five months before the motion was filed. That deposition was taken pursuant to the discovery procedure permitted by the Federal Rules of Civil Procedure. The deposition was nothing more than a disorganized outline of the general nature of the claim. It was not a substitute for the full testimony appellant was to give at the trial. There was virtually no cross-examination—as a matter of fact, only one question was asked and that only to clarify the size of token involved. (App. 33)

Appellant's affidavit, however, was later filed in response to the motion and set forth a more complete statement of the facts. No affidavit in opposition was filed by appellee. Accordingly, there was "no real genuine issue of fact" as was properly observed by the lower court. However, the uncontroverted facts contained in the deposition together with the favorable inferences of the appellant to be drawn therefrom did not warrant the granting of the motion but, on the contrary, required that it be overruled. It is submitted that the lower court was completely wrong in stating in the Memorandum Opinion that appellant had presented "no additional facts", and was also wrong in ruling that the appellant, because thereof, "cannot be heard to qualify, explain or negative what he has admitted categorically by way of deposition". (App. 41)

A comparison of the affidavit and deposition will clearly demonstrate that nothing said in one is negated in the other. There is no inconsistency between them in any respect. Yet, the affidavit does admittedly explain and qualify, in the sense of elaborate, that which was only incompletely stated in the discovery deposition. For example, many letters were introduced during the deposition and were marked as appellant's exhibits for identification (App. 24-29). Those letters tended to show how the contract came into being but were not incorporated in the deposition. The substance and effect of the letters is reflected in appellant's affidavit. (App. 36). Had the trial judge indicated that he would construe the deposition favorably to the party opposing the motion, no affidavit would have been necessary. But since it appeared that he would not follow that established rule of construction, it was deemed necessary, in order to obviate the possibility of drawing inferences unfavorable to the party opposing the motion, to file an affidavit which would supplement the outlined facts developed by the discovery deposition and thereby negative the possibility of inferences

being drawn which were not true but which were possible if an erroneous rule of construction were applied. In view of the Memorandum Opinion, the lower court must necessarily have applied the wrong rule of construction. Rule 56 of the Federal Rules of Civil Procedure permits a summary judgment to be rendered where there is no genuine issue as to any material fact and where "the moving party is entitled to a judgment as a matter of law." The filing of affidavits is expressly approved.

In *American Ins. Co. v. Gentile Bros. Co.* (CCA5), 109 F(2d) 732, 735, the court said:

"Rule 56 clearly provides that a summary judgment should only be awarded when the pleadings, depositions, admissions, and affidavits, if any, disclose that except as to the amount of damages there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. *Under this rule a summary judgment should only be given when it is quite clear what the truth is.*" (Italics supplied)

In *Doehler Metal Furniture Co. v. U. S.*, (CCA2), 149 F(2d) 130, the Court said:

"We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial, when there is the slightest doubt as to the facts, and a denial of that right is reviewable. . . . Such a judgment, wisely used, is a praiseworthy time-saving device. But, although prompt dispatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay. *****Sartor v. Arkansas Natural Gas Co.*, 321 U. S. 620, 624, tells us that, especially where, as here, damages are in question, the courts should go slow about making haste by a summary judgment; there the Supreme Court said that at least a summary disposition of issues of damage should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party."

It is appellant's submission that where there is no genuine issue of fact raised by all the documents before the trial judge on a motion for summary judgment, the proper rule of construction to apply is that the documents must be construed favorably to the party opposing the motion. That is precisely the rule of construction which applies to a motion for a directed verdict and a motion to dismiss. Every consideration prompts the application of the same rule of construction to a motion for summary judgment. The inferences to be drawn favorably to the party opposing the motion may be precisely the ones found by the trier of the facts. And if a Court makes a peremptory ruling as a matter of law, it should clearly appear that the inferences favorable to the party opposing the motion would not render inapplicable the principle of law upon which the granting of the motion is based.

Galloway v. U. S., 319 U. S. 372, 87 L.Ed. 1458

C. & O. Ry Co. v. Martin, 283 U.S. 209, 75 L.Ed. 983

Gunning v. Cooley, 281 U. S. 90, 74 L.Ed. 720

Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 64 L.Ed. 141

Carusi v. Schulmerick, 69 App. D.C. 76, 98 F(2d) 605

Hellweg v. C & P Telephone Co. 71 App. D.C. 346, 110 F(2d) 546

Galt v. Phoenix Indemnity Co. 74 U. S. App. D. C. 156, 120 F(2d) 723

Faucett v. Bergmann, 57 App. D. C. 290, 22 F(2d) 718

The foregoing principle of construction which we urge to be applicable to motions for summary judgment was virtually adopted by this court in case No. 9000, decided on March 11, 1946, *Wittlin v. Giacalone*, where this court said:

"We are impelled to that conclusion because it is well established that one who moves for summary judgment has the burden of demonstrating clearly the absence of any genuine issue of fact, and that any doubt as to the existence of such an issue is resolved

against the movant. The courts are quite critical of the papers presented by the moving party, but not of the opposing papers."

The foregoing principle is more emphatically emphasized by the legal rule that when a contract is attacked on public policy grounds the burden of proof is upon those who charge illegality and the principle *res magis valeat quam pereat* applies.

Hobbs vs. McLean, 117 U. S. 567, 29 L.Ed. 940

Weil v. Neary, 278 U. S. 160, 73 L.Ed. 243

Valdes v. Larrinaga, *supra*

Steele v. Drummond, *supra*

But the court below failed to apply that well established principle of construction. The following illustrates some of the features of the affidavit which negatived the unwarranted inferences which the lower court must necessarily have drawn in concluding that the *Tool Company* case was controlling and that the motion should be granted:

**Lower Court's inferences of fact
based on Memorandum Opinion**

Contract was an employment contract involving the procurement of a Government contract.

Appellant's compensation was to be a commission for procuring a Government contract.

Corrupt or sinister means were used or contemplated.

The contract increased the cost to the Government.

**Facts shown by Deposition
and Affidavit**

Appellant was a joint adventurer and not an employee.

Appellant's compensation as a joint adventurer was contingent upon profits and he was to receive no compensation if there were no profits.

Appellant's services were legitimate and were in the public interest.

There was no increase in cost to the Government.

It is accordingly submitted that had appellant been given the benefit, to which he was entitled, of the rule that the documents before the Court should be construed in his favor, the whole theory of the case upon which the lower Court based its ruling would have collapsed. The case at bar, therefore, presents the very unusual situation where the lower court has, in effect, made findings of fact on a motion for summary judgment contrary to those reasonably shown by the record and then granted a summary judgment based on such findings. We submit this was error.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the court below was plainly in error in granting the motion and in ruling that the contract between the parties was void as against public policy, and in failing to rule that the contract was valid and constituted a legitimate joint enterprise between the parties. By a fair interpretation of the facts set forth in appellant's deposition and affidavit and by applying thereto the established rule of construction, the judgment in favor of the appellee must be reversed and a trial on the merits ordered.

Respectfully submitted,

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1001 - 15th Street, N. W.

Washington, D. C.

Attorneys for Appellant

APPENDIX

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United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9185

MAX SILVERMAN,

DOING BUSINESS UNDER THE NAME AND STYLE OF
BROADCAST SPECIALTIES COMPANY,

Appellant,

VS.

OSBORNE REGISTER COMPANY,
A CORPORATION,

Appellee.

Appeal from the District Court of the United States
for the District of Columbia.

JOINT APPENDIX TO BRIEFS

1 IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

MAX SILVERMAN

doing business under the name
and style of

Broadcast Specialties Company
120 West 42nd Street
New York, N. Y.,

Plaintiff

vs.

OSBORNE REGISTER COMPANY

a corporation

1115 Fifteenth Street, N. W.,
Washington, D. C.

Defendant

CIVIL ACTION NO.
23160

Filed Feb 18, 1944

Charles E. Stewart, Clerk

COMPLAINT

Breach of Contract

1. The claim for relief herein on behalf of the plaintiff, Max Silverman, an individual, doing business under the name and style of Broadcast Specialties Company, against the defendant, Osborne Register Company, a corporation, is for an amount in excess of \$3,000 based on breach of contract and is within the jurisdiction of this court.

2. The defendant, Osborne Register Company, is a corporation engaged in the business of manufacturing tokens, coins and emblems and doing business in the District of

Columbia. On or about September 1, 1943, plaintiff and defendant entered into an agreement whereby they agreed to join their resources for the purpose of consummating a contract with the United States for the manufacture and sale of ration tokens. Pursuant to the terms of said agreement, plaintiff's share of the profits to be earned from such contract for the manufacture and sale of ration tokens was an amount equal to fourteen cents (\$.14) for each unit of one thousand (1000) tokens manufactured and sold under such contract. Said contract for manufacture and

2 sale was successfully consummated and two million units were manufactured, sold and delivered thereunder, subject to the aforesaid agreement between plaintiff and defendant. Plaintiff has fully performed all the obligations imposed upon him by said agreement, but defendant has violated and breached the same in that defendant has failed and refused to pay to the plaintiff the sum of Two Hundred Eighty Thousand Dollars (\$280,000), which sum is now due and owing from the defendant to the plaintiff, all to the plaintiff's damage in the sum of Two Hundred Eighty Thousand Dollars (\$280,000).

3. Wherefore plaintiff demands judgment against the defendant in the sum of \$280,000 with interest at six percent per annum from the date of the filing hereof, besides costs.

ALVIN L. NEWMYER
JAMES P. DONOVAN
Attorneys for Plaintiff
Rust Building
Washington, D. C.

3

MEMORANDUM

JULY 24, 1944

Order allowing amendment of complaint and overruling motion to quash service of process, filed.

4

Amendment To Complaint

(Filed July 24, 1944)

Leave of court having been granted, comes now the plaintiff in the above entitled action by his attorneys and amends the complaint filed herein by substituting for paragraph 1 thereof the following:

1. The claim for relief herein on behalf of the plaintiff, Max Silverman, an individual, doing business under the name and style of Broadcast Specialties Company, against the defendant, Osborne Register Company, a corporation, is for an amount in excess of \$3,000, based on breach of a contract which was to be performed in part in the District of Columbia and is within the jurisdiction of this court.

ALVIN L. NEWMYER

JAMES P. DONOVAN

Attorneys for Plaintiff

Rust Building

Washington, D. C.

5

MEMORANDUM

NOVEMBER 25, 1944

Certified copy of order of United States Court of Appeals denying petition of defendant for allowance of a special appeal, filed.

6

ANSWER

(Filed Dec. 8, 1944)

First Defense

The defendant is a corporation organized under the laws of the State of Ohio, and is not doing or transacting business in the District of Columbia, and is not a resident

of the District of Columbia, nor has it been found within the District of Columbia. The purported service of process on the defendant is insufficient and invalid, and this Court lacks jurisdiction over the person of the defendant.

Second Defense

The complaint fails to state a claim against the defendant upon which relief can be granted.

7

Third Defense

The defendant admits that the claim is for an amount in excess of \$3,000, but denies all the other allegations contained in paragraph 1 of the complaint; admits that it is a corporation engaged in the business of manufacturing tokens, coins and emblems, but denies all the other allegations of paragraph 2 of the complaint.

The defendant denies that it entered into an agreement with the plaintiff as alleged in the complaint, denies that it has violated or breached any agreement with the plaintiff, and denies that any sum is due or owing by the defendant to the plaintiff. The defendant denies each and every allegation contained in the complaint not specifically admitted.

Fourth Defense

If any agreement had been made as contended by the plaintiff, such agreement would have been against public policy, and would be illegal and unenforceable.

SPENCER GORDON

701 Union Trust Building
Washington 5, D. C.

Attorney for defendant
Osborne Register Company

8

MEMORANDUM

DECEMBER 8, 1944

Cause calendared for trial.

* * * *

10

Washington, D. C.,
Friday, March 2, 1945.

(Filed March 27, 1945)

Deposition of MAX SILVERMAN, a witness of lawful age, taken on behalf of the defendant in the above-entitled cause, wherein Max Silverman, doing business under the name and style of Broadcast Specialties Company, is the plaintiff and Osborne Register Company, a corporation, is the defendant, pending in the District Court of the United States for the District of Columbia, pursuant to order of the Court, and continued until 3 p.m. this day, by stipulation of Counsel, at Suite 700, Union Trust Building, 740 Fifteenth Street, Northwest, Washington, D. C., at 3 p.m., Friday, March 2, 1945.

11

MAX SILVERMAN

a witness of lawful age, was thereupon duly sworn and, being examined by counsel, testified as follows:

DIRECT EXAMINATION

BY MR. GORDON:

Q You are Mr. Max Silverman? A Yes, sir.

Q And you are the plaintiff in this case against the Osborne Register Company? A Yes, sir.

Q Mr. Silverman, your business is described as Broadway Specialties Company.

Will you please tell us, is that a corporation or partnership, or your individual business? A My individual business.

Q That is just your trade name? A That is correct.

Q How long have you been doing business under that name? A About three years.

Q Will you state the business you have been doing?
12 ing? A Sure. Prior to the beginning of the war I had a Broadcast Specialty Corporation, which also bore the same name, which was a corporation, which was dissolved approximately three years ago and I carried on that business right along.

My business consisted of radio premiums mostly supplying these premiums to sponsors of such organizations as General Foods, Dr. Lyon's Tooth Powder, Kolynos Toothpaste, Sterling Products for Amanda of Honeymoon Hill, and various other radio premiums.

Kate Smith had promoted one of my slave bracelets on the radio. This was the first time she ever endorsed a piece of jewelry to the radio audience on my behalf.

When scarcity of materials arose, I then did business with such organizations as the British War Relief Society; Russian War Relief Society; British Ambulance Corps; Bundles for Britain; Red Cross, and other organizations too numerous to mention.

Q Will you tell me what you mean by a radio premium?
A Program?

Q A radio premium. A A radio premium consists of an article made in quantity production for a reasonable price originated by me and then developed by such organizations and advertising firms known as Young, Rubican, where Gallup Poll is written, Blackett, Sample and Hummert; Benton & Bowles, where Mr. Chester Bowles originates from, and many other attempts with houses like Batton, Barton, Durstin & Osborne.

Q Can you give us an illustration? A Of what
13 these things are?

Q Yes. Just one. A As an illustration, Kolynos Toothpaste desired to have a premium to sell their Kolynos Toothpaste. So they arranged a program through

the advertising medium and in this program they created a position whereby somebody is presented with a gift, and a part of this appeal over the radio, it is a radio appeal at all times, and mind you, this goes to a listening audience that numbers twenty million people in this country over a network from 80 to 100 stations or more.

They display this piece of jewelry, such as in the Kolynos instance of a beetle pin that one of the actresses had just received, made out of gold, and they go on to tell the audience thereafter that through the ability of a manufacturer who could turn these pins out for them at such a reasonable price, if they buy a box of Kolynos Toothpaste and send a box top with 10 cents in coin or 15 cents in coin, they will send the pin. In this particular instance the beetle pin consisted of a 10-cent premium. They were then sending this beautiful beetle pin for 10 cents.

Q Then I suppose the Bundles for Britain, they would have premiums that you gave? A No, the British War Relief Society—am I permitted to say?

Q Yes. A The British War Relief Society in trying to raise funds came upon the idea of getting a "Thumbs Up" pin, and they called upon me to produce this item for them at a fair and reasonable price, and they gave
 14 me an order for half a million at about five and a half or six cents apiece which they in turn raised 25 cents on each pin that they sold.

Gracie Field, the English actress, flew 24 of those pins, the first batch I had made, to England, and prior to her flight she presented these to the Mayor of New York, LaGuardia, and Mr. Churchill at Casablanca had been wearing that very same pin of my make.

Pictures of Mr. Churchill at Casablanca show the pin.

Q So your business is the sale of pins and souvenirs?
 A Pins and souvenirs.

As an illustration the American Can Company some time previous desired to imitate for the convention their cans that they are making, and they needed imitation cans with can openers, and I produced this can for the American Can Company with which they were mighty pleased.

Q Where is your office, Mr. Silverman? A 120 West 42nd Street, New York City.

Q What do you have there? What sort of place is it? A My place of business consists of a secretary, stenographer and myself. I have a man over there who does a little help in the way of work from time to time, but is not one of my regular employees.

Q Do you have any factory? A No, sir.

Q How do you procure the pins and souvenirs that you sell? A May I explain?

Q Certainly. A In my procedures I use the
15 process of elimination. As an illustration if a large factory who is in competition with me would buy raw material they would make a profit on the raw material. If they had a sample job they would make a profit on the sample job, and if they had a plating or soldering or finishing job they would make a profit on each and every one of those items, and they would have cost sheets and add on various profits for big executives who do nothing but wait for people like me to procure big orders for them.

Now in so far as the Red Cross pin, I have placed an order for a million pins and buttons with the Osborne Register Company.

Prior to giving the Osborne Company this order I had Red Cross pins and buttons manufactured in New York by the Novel Products Company. They would bill me for the article.

Q You mean the Red Cross would bill you? A No, no. The manufacturer, the Novel Products Company or Osborne.

Q The Novel Products Company or Osborne would bill you? A Would bill me for the materials. I would then have those either sprayed in a plant where the overhead wasn't as steep, where these expenses I have been talking about before, where I could procure this type of work at a very reasonable price.

I would then have them packed in a specialty packing place and by this doing this sort of job I am able to bid for contracts and undersell many of the other firms, and I turn out a very good product that is well received, and I don't lose any accounts because of non-ability to
 16 serve them, and on this Red Cross blood donor pin, may I add that I bought this pin and the buttons from Osborne Register Company for about \$30 some odd a thousand, and while I spent an additional \$10 on them I realized \$60 odd a thousand. That made it quite a handsome profit.

MR. DONOVAN. I think you have answered the question.

MR. GORDON. I think that is clear.

MR. DONOVAN. Yes, I do also.

MR. GORDON. Yes.

BY MR. GORDON:

Q Now in your complaint in this case, which, of course, is signed by your lawyers and is not sworn to, and is just gotten up in the way a lawyer would get it up, there are certain statements made and I want to run through them with you and translate the legal language, and have you tell me what the actual facts are in plain English.

Do you see what I mean? A Yes. If I don't understand anything you are going to make it clear to me.

Q Certainly. You say, or rather your counsel say, "On or about September 1, 1943, plaintiff"—that is you, Max Silverman,—“and the defendant”—that is Osborne Register Company—“entered into an agreement whereby they agreed to join their resources for the purpose of consummating a contract with the United States for the manufacture and sale of ration tokens.”

Now let me ask you first was there any formal written contract between you and the Osborne Register Company signed by the two of you on which you rely in this
17 case? A On which I rely in this case? You said something about September 1st.

MR. DONOVAN. That says on or about. We just plead generally.

BY MR. GORDON.

Q That is what I read to you, my first question.

MR. GORDON. Read my question.

(Question read.)

BY MR. DONOVAN:

Q Did you understand the question? A Whether there was any contract?

Q Written contract. A Written contract.

Q That is right. A My recollection, and I haven't got my records with me, on or about the 20th day of August, 1943, I telephoned Osborne. I told Wiley to send me some fiber tokens, some about the size of a little less than a dime, and some about the size of a nickel or a little over a nickle or a little lower than a nickel, and give me his quotation, and see that he mails me this by air mail as I will need same the following day, and give me his price so I can bid on a contract.

On the 21st day of August I received a letter quoting me prices and enclosing some samples.

I sat around all the afternoon trying to reach the officials who were interested in this token proposition. They were all at a meeting. It was about 5:30—

MR. DONOVAN. (interposing) Just a moment. That doesn't answer your question.

18 MR. GORDON. That is all right, he is coming to it. It doesn't matter.

BY MR. GORDON:

Q You tell your story. A I don't know anything about legal matters.

Q Go ahead. A Well, at 5:30 or thereabouts, when I was waiting at the Office of Price Administration for a Mr. Billig and Mr. Carolyn, and when they arrived I showed them these samples.

They messed around with them trying to break them, to see if they could bend them, and he asked me whether they could be had in colors and I said "yes."

They asked what was the nature of the material and I told them vulcanized fiber.

They seemed very much impressed and they told me up to the present nobody brought any such samples to their attention, that they were then considering a cold, molded token made out of resin, similar as used on tops of whiskey bottles, and they also had under consideration pressed paperboard tokens, and they told me that so far as they were concerned they were not at all interested in that program, and they could not be sure whether an order would be coming out that day or not, or whether the entire program would be good or bad, or even get through, but if it does go through I brought in the finest sample so far brought in.

He went on to ask me, Mr. Carolyn did, whether I could have the letters raised on the tokens instead of indented. I told him they could be had that way, but it would slow up production.

19 He then asked me where my factory was and I told him I had no factory. He said if you haven't got a factory you won't be able to bid, and I asked him why I would not be able to bid, I am now delivering a badge pin to you, and I have an order for a quarter of a million pieces, and you are pleased with the production and you can check that with your purchasing department and Office of Emergency Management, they will bear me out.

He said, "I don't care anything about the badge business, this is one job if I have anything to do with it, it will be all from the manufacturer," and I asked him his reason and he said, "This job is so big that it is comparable to a Government mint."

He said "We will have to first examine the plant to make sure that we can have our own guards, we can have surveillance over this particular plant, we almost would have to run the plant in order to protect the manufacturer of this article and see that it doesn't get into the hands of the people who are working at it, or that the tools and dies will not be stolen out of these, because this is going to be treated the same as currency is treated, and therefore it will make it impossible for you to bid on this contract."

This was Saturday night. I then left for New York and got home on Sunday. On Monday morning from my office I phoned Osborne and said:

"Wiley, I received the letter and prices and your samples Saturday afternoon, and I set around all Saturday afternoon until I could see these proposals at the Office of Price Administration, and after explaining to
20 them and they being enthusiastic with the goods I

ran into a hitch," and he said "What was the hitch," and I explained to him that what Mr. Carolen told me and I said "I better go out and get myself a factory, or else a manufacturer to do the bidding for me."

Whereupon Wiley said "Are you crazy?" What do you have to have any manufacturer do the bidding for you? Didn't I tell you that if you could get them to use fiber that I had no deal on with Scoville because the only deal I have with Scoville is on pressed paperboard, and now if you get them to the point where they are going to use fiber, O.K., Max, I will do the bidding. What do you want me to tack on?" And I said "15 percent above the price you quote me in your letter of August 20th," he said "That is fine, that suits me to perfection," and I requested him to send some samples to the attention of Mr. S. M. Billig at the Census Building, and he told me that "I will carry on from that point and report to me from time to time."

I am trying to refresh my memory.

Q Do you want to see these papers Mr. Donovan has?

MR. DONOVAN. Yes, I have them.

BY MR. GORDON:

Q Perhaps from the letters you may refresh your recollection. Mr. Donovan has all the correspondence.

MR. DONOVAN. You can use these to look at the dates.

THE WITNESS. All right.

BY MR. GORDON:

Q As I understand you gave Mr. Donovan all the correspondence you had relating to this? A That is true.

21

Q And Mr. Donovan is showing it to you now, but look at any of the letters to refresh your recollection

and tell your story based on the correspondence and what happened. A Thank you very much. May I continue?

Q Yes.

MR. DONOVAN. Is that the contract or is there anything else?

MR. GORDON. No, he is going ahead and tell how his claim arose and what his contention is.

THE WITNESS. He told me "What do you want to tack on?" I said "15 percent above the cost," and he said O.K. and he said "I will do the bidding."

BY MR. GORDON:

Q Then what occurred, just go ahead and tell the story in your own way.

Let us see if there are any letters that came before that time this letter of August 20, 1943, to you, to Mr. Max Silverman, Willard Hotel. A Which one?

Q August 20th. A That is one.

Q Coming from Mr. Osborne to Mr. Max Silverman? A That is right, and later, on or about the 25th or 26th of August Mr. Osborne telephone me at New York. I say approximately those dates, and he had asked me who my people were with whom I was operating with, and wanted to know who I was over-friendly with to have accomplished getting them to use fiber.

22 I told him that was useless to discuss over the telephone right now, and I balled him out unmercifully for a letter he had sent at my request, but not according to what I told him to do, to the Office of Price Administration.

In other words, he went on to tell those men at the Office of Price Administration about another material that he was sending samples too, and about the Scoville Manufacturing Company, that he was tied up with them, and he said "What are you worried about? Suppose I did do

that. I want to be in the good grace of these people." He said, "Heretofore they were going to do the bidding, and I was going to help them make up the bid. Now since you are in this picture why did I care. I only did that to be on the friendly side of Mr. Hyde who I asked him to make some. That don't take any skin off your back."

Q All right, go ahead. A Then on or about the 3rd of August Wiley wrote me a letter and told me that he wasn't altogether keen on this rationing business, he didn't see this thing through and he wasn't going to do any real pulling to get the job, he wants to get away for a vacation and he wants to be away 15 days, and he gives me the address of where he was going to be and told me he can be reached by telephone, but will be here where it takes a letter from New York two or three days if I recall correctly.

In the meantime, we were worrying him about some other work that he was doing at the time for us, such as a Minute Man, I had asked him to make for me for an agricultural society. They were then thinking of
23 sending boys up to the farms, and they wanted to buy several million of these pins, and he was supposed to have gotten up samples and offered prices, so I could have them colored and finished in New York and also procure the business, also a Rubber Director award if I am not mistaken at the same time.

In the meantime during this period I had been going around still seeking information, being in touch with the various departments, the Conservation Department. I had been around to the Office of Emergency Management and I have been two or three days out of every week taking in to see what developments are now forthcoming, and this led me on to about the 12th or 13th of September when I learned that some Government inspectors will go out and examine my plant.

I immediately called Cincinnati and I spoke to Sol.

Q Sol who? A Sol Osborne, brother of Mr. Wiley Osborne, and I asked whether he heard anything whether it was definite Wiley would be back on the 14th or 15th. He said yes, he was sure he would be in on the 15th, and to prove my information was correct, on the 15th of September I received a telephone call from a gentleman at the Office of Price Administration who was trying to make contact with me in New York throughout the day when I wasn't in my office, and when I finally called him back he asked me to come down.

Q Who was that? A Mr. Esslin. I came to Washington by plane. I immediately went over to the Census Building where I met with Mr. Esslin, was led into Mr. Esslin's office.

24 When I got there he told me that my name was given to him by a Mr. Savage from the Conservation Department of the War Production Board. Mr. Esslen was also in need of tokens and he wanted to know where my plant was and could I take him there.

This brought out the fact I knew there had been some agent going there. So I had called Wiley, but he then gotten back from his Canadian trip and I took Mr. Esslen with me that very night. I think about eight o'clock we left on a train for Cincinnati with the understanding that Wiley was supposed to meet me and the Government agent at the station and that would be at nine o'clock when the train would arrive. We got off the train and waited about three-quarters of an hour and finally Mr. Osborne came along and greeted men and I introduced Mr. Osborne then to Mr. Esslin. I told him "This is Mr. Wiley Osborne of the Osborne Register Company," and "this is the man that is going to show you the plant and give you the answers that you are going to look for."

We then got into Wiley's car. We went over to the Osborne Register Company office. We went upstairs into

his office and I suggested to Wiley to call the fiber man in, Mr. Bauer who represented the National Vulcanized Fibre Company at Cincinnati, their Cincinnati office.

We sat around about two hours, Mr. Esslen, Mr. Osborne, Mr. Bauer, and myself, and we talked about the terms of getting the fiber into coils so that they could be automatically fed through the power presses, and I suggested to Mr. Bauer to immediately contact his firm and get the information necessary as to how soon they could get that into coils, because this was the first time Wiley was convinced, since Bauer knew all about the availability of the material. Heretofore Wiley didn't have any idea such a thing as fiber was going to be available. He thought I was on a wild goose chase.

Mr. Esslen made a lot of notes and asked a lot of questions, and I protected the situation. I didn't want Wiley to answer all the questions because a lot of it was pertaining to fiber, and I wanted Mr. Bauer to go on record, which happened.

We then recessed and went to lunch and there was Mr. Bauer, Mr. Esslen, Mr. Osborne and myself. We were at this restaurant about two hours. It took about an hour back and forth.

Well, at the restaurant, at the completion of the meal and everything, and while with his good humor telling some stories that he had learned up in Canada, and finally Wiley say to Bauer, "Let us toss and see who will pay for this lunch." I said "You fellows don't have to toss, I will pay it." And I paid the lunch and left the girl a tip of \$3.50 I had from the lunch bill. The girl said to me "I am friendly with Mr. Bauer. When you come in here again please come to my table."

With that, we returned to the office of the Osborne Register Company and Mr. Osborne asked me to excuse him, he wanted to take Mr. Esslen around and show him the

availability of the plant; that should we get the order, although I knew in my heart when I went out there I already had the order sewed up, and he suspected as much or he would not have been interested that he wanted to show him the plant that was available, and did a disappearing act with Esslen and didn't come back until about

5:30. In the meantime I made myself comfortable
26 in the office. I telephoned New York and I telephoned to Cleveland. Incidentally all these calls were paid by me. They were collect calls, I believe, and I had been on the telephone trying to get reservations back because Mr. Esslen told me on the train that he had to be back that night, he had another meeting the next morning, this rationing program is so important that he must know everything immediately and they are going to have a meeting on it the very moment he gets back, so I should be doubly sure to know there was going to be a flight going and he told me what flight he was going. I telephoned the Airport and it was canceled off.

MR. DONOVAN. Who was canceled off?

THE WITNESS. Mr. Esslen was canceled off the flight, and after a lot of persuasion on my part I finally got a reservation back, I think it was somewhere around seven or eight o'clock. I was with good fortune able to get a reservation back to Washington for Mr. Esslen and I, we got back here that very night.

I then went to my hotel room at the Willard and stayed on there for several days thereafter, digging for information as to what would transpire at that meeting the following day and getting a lot of people I know I almost have the job cinched, and I don't know of anybody that could do the job better than I could, I and Wiley.

BY MR. GORDON:

Q Getting a lot of people to know what? A That I was interested. I had been moving around with this thing

since the latter part of June.

27 MR. DONOVAN. Of what year?

THE WITNESS. 1943. I saw the possibility of a big contract that I could grab off and make some money, and I spent all my time and energy on it. I neglected my business completely. I was looking to get the contract sewed up, and I assure you every time I go after a contract of this kind I get it and I believe Mr. Esslen was told that too by a gentleman that knew me.

This was the 16th of September that I got back here from Cincinnati. Between the 16th of September, as I stated before, I remained several days here and came back the following week and kept working and working on this and then I learned that there would be a meeting about the 27th day for a discussion of placing this contract, and getting everybody who is connected with the war effort who could be of any help in the procurement of scales, additional equipment and machinery. Whether it would be available and discuss that and offer all their assistance to the WPB.

Wiley called me and told me about this meeting. He then still had a conscience and he asked me about it, and I said, "Do you want me to make a reservation at my hotel," knowing how difficult reservations were. He said "I am coming down there with a very nice man and I will be at the meeting alone. It is best you don't stay around. You might say something that might interfere." He said, "Let me handle this matter from this point on." He says, "What do you have to worry about, I will sell him a bill of goods." So I told him to notify me just as soon as the meeting was over.

28 MR. DONOVAN. What was this meeting?

BY MR. GORDON:

Q Describe that. A The meeting was the WPB and the officials from OPA and officials from the Office of

Emergency Management, people who were going to purchase these tokens.

They were discussing changes on this program. In other words, I wasn't present at the meeting, but I got all that information that they were then changing their plans to get tokens, they were going to eliminate the larger tokens and stick to smaller ones in order to enable them to buy two billion because of the scarcity of material. This transpired at that meeting which was around September 27th. Since Wiley told me not to come to Washington, he telephoned back to my office and he told somebody—

MR. DONOVAN. Don't repeat conversations.

THE WITNESS. As I told you—

BY MR. GORDON: (interposing)

Q I don't mind. You heard it from some of your people? A I wasn't there, but he called, I don't know whether it was collect or not, and he advised one of the girls who is now in the Service that if he were Max he would go out and spend his money now.

Q He telephoned your office and told the girl that? A I wasn't in.

Q The girl told you he said that? A. That is correct.

Q Did she make any note of it? A She told me that. He didn't deny it. We will come to that.

Q All right. A This happened after the meeting. Well, finally a few days more elapsed and on October 4th the opening of the bids was to be held over at 499 Pennsylvania Avenue, the Office of Emergency Management. Wiley communicated with me and told me that he would see me in Washington, for me not to come by at the bid. I asked him why, and he said "I told you before I don't want you around there until I get that order in my hands." He said "That is as sure as you live. We don't have to worry." Prior to that he was very difficult about it. He didn't think they would use the tokens.

I said "Wiley, you be sure and see me the moment you are through, and if you find we are the lowest bidder, call me at the hotel."

This was October 4th. I waited all day and all night. I tried every hotel in Washington to locate him. He wasn't registered it seemed, under his name.

Then the next morning about 11:15 or 11:30 Wiley telephoned me with a million apologies, he was out after realizing that we were the successful bidders, that he went out to make merry with these friends of his he brought from Cincinnati, or who he met here from Cincinnati, and they were galavanting all night and he had a big head, and could he come over and see me.

I was in my room at the time. I told him I had these gentlemen and said "We are going down to lunch at the Willard Room." I was embarrassed. That was the
 30 first suspicion I had. I thought he was the most honorable man I ever met, and he had fallen down on not having me go to the opening of the bids. He kept me here away from the meeting on the 27th. Instead of notifying me right after the bid is opened he loses me and makes apologies. Being sore at him I didn't want to arouse my anger in front of these two gentlemen. I went down to the dining room and the four of us sat down to lunch. We were about complete with the lunch when Wiley said, "Max, this is a good time for me to tell you. I don't know how to break the news to you, but you always get a man on a full stomach." He said, "Did you know I sold my business out to the Dayton-Acme Company?" I said "What? How can you do a thing like that without consulting me?" He said, "Don't worry I will look after you."

I got boisterous there. I was going to kill the man, that is what I would do, after spending all these months and wasting my efforts and time, and having full confidence

and faith in him. I trusted him. I went out fussing with him. In New York you never saw Wiley without Max. They were the best friends.

MR. DONOVAN. Just stick to the story and tell what happened at that time.

THE WITNESS. So he said "You better come upstairs and don't cause any noise down here. I will explain everything upstairs."

When he got upstairs these two men came along with me because they had adjoining rooms alongside of mine and they were friends of mine from New York, and he said,

31 "Max, I can't help it, but this man that owns the place under the name of Phail"—I never met the man in my life—"wants to give you \$5,000." I said "\$5,000?" I said, "What are you going to give me that for?" I said, "I want what is coming to me, I want every penny." He said, "Max, my hands are tied and I can't do anything." I said, "Look, Wiley, get right out of here, or I will kill you," and he ran right out. I wish I did kill him. People like that.

About 15 or 20 minutes later he telephone me at the hotel again. He said, "Max, do you want to come over and see this friend of mine Phail," I said "What for?" He said, "He will give you \$10,000." I said "He can take the \$10,000 and stick it up," and I said, "I am going to get even with you if that is the last thing I do." I was not going over to see him. I attended to my business, and I went around inquiring whether I could find a lawyer.

BY MR. GORDON:

Q I will admit you have got a darn good lawyer, two of them. A So I have heard. I like Mr. Donovan a great deal, a fine gentleman.

Q Well, I gather you then filed your suit? A Yes, sir.

Q That is about the size of it? A Yes, sir.

Q Did you have any further conversation with Mr. Osborne from the time you have just described down to the time of the filing of the suit? A No, but some letter has been written here about some dyes for the blood donor pins, and I needed them. That was the only correspondence I recall. I never spoke to him since.

Q What was the date of the conversation in the Willard? A The 5th.

MR. DONOVAN. At the time you had the argument.

THE WITNESS. The dog didn't come around.

MR. DONOVAN. Just answer questions and don't make personal remarks. We don't want to deal with personalities in this case.

BY MR. GORDON:

Q Mr. Silverman, I would like to be sure that we know on both sides what letters exist which have anything to do with your claim.

Now you have in front of you the file of letters which has been given you by Mr. Donovan. A That is right.

Q Are those the letters you gave to Mr. Donovan? A They are.

Q Are those all that you have that relate to your claim against the Osborne Register Company which is the subject of this suit? A That is correct.

Q Now the first one is a letter on the letterhead of the Osborne Register Company dated August 20, 1943, Mr. Max Silverman, Willard Hotel, and it is signed W. W. Osborne. Is that right? A That is correct.

MR. GORDON. We will ask the reporter to mark that Exhibit 1.

33 MR. DONOVAN. Whose exhibit?

MR. GORDON. Nobody's. Mark it for identification Silverman Exhibit 1.

(The letter referred to was marked Silverman Exhibit 1 for identification.)

BY MR. GORDON:

Q What is the next? A August 23, 1943.

Q That is to Mr. Max Silverman from W. W. Osborne?

A Yes, sir.

MR. GORDON. We will mark that Silverman Exhibit No. 2 for identification.

(The letter referred to was marked Silverman Exhibit 2 for identification.)

BY MR. GORDON:

Q Let us have the record show that this letter to Billig was attached to the letter of August 23rd to Mr. Silverman and that will be marked as Silverman Exhibit 3.

(The letter referred to was marked Silverman Exhibit 3 for identification.)

BY MR. GORDON:

Q The next you have, Mr. Silverman? A August, 24th.

Q August 24, 1943, to Max Silverman from W. W. Osborne. A Yes, sir.

MR. GORDON. We will mark that Silverman Exhibit No. 4.

(The letter referred to was marked Silverman Exhibit 4 for identification.)

34 BY MR. GORDON:

Q Now what is the next one? A August 30th.

Q 1943, to Mr. Silverman from Mr. Osborne. A Yes, sir.

Q Did that have a couple of things attached to it? A Yes.

Q What were they, a telegram? A No, there was a letter from Scoville.

Q Letter from Scoville to Osborne dated August 5th.

A Yes, abusing me.

Q Also copy of telegram from Hyde & Wood. Is that correct? A Yes, sir.

MR. GORDON. Mark that Silverman Exhibit No. 5.

(The letter referred to was marked Silverman Exhibit 5 for identification.)

BY MR. GORDON:

Q Have you the next? A Yes, sir.

Q What is that? A September 18th, Mr. Max Silverman, 120 West 42nd Street.

Q From whom? A Osborne Manufacturing Company.

Q How does it start? A It says "Dear Max."

"I am awfully sorry." A "I am awfully sorry."

35 MR. GORDON. Mark that Silverman Exhibit 6.

(The letter referred to was marked Silverman Exhibit 6 for identification.)

BY MR. GORDON:

Q One more. A Another letter of September 18th from Osborne Manufacturing Company to Max Silverman, "Dear Mr. Silverman, relating to Rubber Director award."

Q "Just received your telegram." A That is right.

MR. GORDON. All right, mark it Silverman Exhibit 7 for identification.

(The letter referred to was marked Silverman Exhibit 7 for identification.)

BY MR. GORDON:

Q Mr. Silverman, are these letters which have been identified now as Silverman Exhibits 1 to 7 inclusive for identification the only letters that you have from the Osborne Register Company or from Mr. Osborne, or from anyone else on whom you base your claim in this case? A These are the only letters I got from the Osborne Register

Company or Wiley Osborne. Most of my letters came from Wiley direct.

Q Well, have you any letters from Wiley that have anything to do with this case that you have not produced?

A No, sir.

Q So that to the extent that your claim is based on any correspondence this is all the correspondence. Is that correct? A That is correct.

36 Q And I am correct also in understanding then that there was no formal contract in writing that was on a sheet of paper and signed by you as one party and by the Osborne Register Company as the other party? A I don't know what you mean. There was no necessity for anything like that.

MR. DONOVAN. Answer "yes" or "no."

THE WITNESS. No.

BY MR. GORDON:

Q Your answer is "no," there was no such thing as that? A Yes.

Q And you understand there was no necessity for it? A That is right.

Q Am I also correct in understanding that you have told the complete story of this transaction from your point of view? A To the best of my recollection.

Q There isn't anything else that you will say at the time of the trial that you haven't said today?

MR. DONOVAN. I object to the question. In the first place it calls for a conclusion.

MR. GORDON. Oh, yes. I withdraw that.

BY MR. GORDON:

Q Did you have any conversations with Mr. Wiley Osborne about the matters which brought this suit up other than what you have told us today? A October 5th.

MR. DONOVAN. Listen to the question.

37 MR. GORDON. Read the question.

(Question read.)

THE WITNESS. No, sir.

BY MR. GORDON:

Q Did you ever have any conversation with Mr. Phail?

A I don't even know the man.

Q You have never seen him? A I have never seen him.

Q And never talked with him? A Never talked with him.

Q Did you have any conversation with anyone else whom you contend was connected with the Osborne Register Company other than Mr. Osborne? A No, sir. I don't know of anybody connected with the Osborne Register Company. I always knew Wiley to be the boss. He was my friend and boss.

Q He was the only one you talked to in connection with this matter? A Yes, sir.

MR. DONOVAN. I don't think that is in accordance with the testimony he gave. He said he spoke to Sol.

THE WITNESS. It was a telephone call to inquire.

MR. GORDON. Let us bring that out.

BY MR. GORDON:

Q With the exception, of course, of what you said about talking to his brother, Sol, to make an appointment? A That is right.

Q I have here several photostats of letters in our files about the blood donors which I will show you, and
38 I will ask you if this N. Friedman is your secretary? A She was. She is no longer with me. She is in the Service.

Q Was she the lady who told you she had gotten this telephone call from Mr. Osborne? A I believe it was her.

Q Do you recall the subject matter of those letters? A This one I do, the blood donors. That would be subject matter pertaining to the Red Cross.

Q Mr. Silverman, I have just shown you four letters about the blood donor emblems written to Mr. Osborne from your company from September 3rd to September 16th, inclusive, which appear to be signed by N. Friedman.

These are photostats of the originals. Can you say that they came from your office?

MR. DONOVAN. You mean the originals?

MR. GORDON. Yes, the originals, from looking at those photostats

THE WITNESS. I believe they are.

BY MR. GORDON:

Q That appears to be Miss Friedman's signature? A Yes, sir.

Q And it looks like your letterhead? A Yes, sir.

Q And it is the kind of letter you would have expected to have been written about that subject? A Yes, sir.

Q Mr. Silverman, you have referred to the blood donor pins.

39 Will you tell us in your own way who you had a contract with for those and what they were, and what you did, not too long a story, but just the high spots of it? A I had a contract with the American Red Cross.

Q All right. When was the contract made approximately? A Some time before 1943 or the early part of 1943.

Q Now was that a contract between the Red Cross on the one side and Max Silverman on the other, whereby Max Silverman was to sell some pins to the Red Cross? A The contract was with the Broadcast Specialties to begin with.

Q Well, that is Max Silverman. A That is right.

Q And Max Silverman doing business as Broadcast Specialties Company contracted to sell some blood donor pins to the Red Cross? A That is right.

Q And then Max Silverman in turn made a contract with the Osborne Register Company whereby the Osborne

Register Company was going to manufacture some of these pins and sell them to Max Silverman. Isn't that right? A When you say "made a contract" I agreed to give some business to the Osborne Register Company.

Q Well, Osborne Register Company was going to manufacture the pins or some of the pins? A That is right.

Q Some of the pins or all of them. A I had them made elsewhere before I had them made with the
40 Osborne Register Company.

Q But for a period Osborne Register Company was to manufacture these pins. A In an unfinished state. I supplied the parts.

Q You supplied the parts and Osborne Register Company manufactured them? A That is right.

Q Osborne Register Company did not sell them to the Red Cross? A No, sir.

Q They sold them to you. Is that right? A Yes, sir.

Q And then you did whatever else was necessary and sold the finished product to the Red Cross. Is that correct? A That is correct.

Q What were the names of the two men who were with you at the Willard? A One man's name—should I divulge that information?

MR. DONOVAN. Certainly. They are entitled to know it.

THE WITNESS Mr. Harry Foster.

BY MR. GORDON:

Q Can you give me his address? A Yes, sir.

Q Then give it. A 4 Blount Street, Providence, Rhode Island.

Q What is his business? A Jewelry business.

Q What is the name of the other one? A A.
41 Blackman. He was a certified public accountant.

Q What is his address? A I would have to find that out. I can get it at the hotel.

Q Do you know what city it is? A It is outside of Rhode Island. It is near Rhode Island. He was accountant for Foster.

Q You have his address at the hotel? A I can locate it.

Q Could you drop me a line at your convenience and let me know that? A I would be very glad to do that. I want to take one of your business cards.

Q What were the blood donor pins made of? A Secondary antimonial lead. A material I found available to have these pins made of.

Q As I understand it your contention is that Mr. Osborne promised to add to his bid 15 per cent of the price he had quoted you for small size tokens, that is, 15 per cent over \$1.05 per thousand, and in that you were to get the 15 per cent. Is that right? A That is correct.

Q That is what you contend? A I don't contend. He agreed.

Q All right. How much would that make your claim at this time? A I think my attorney could best answer that. \$280,000.

Q In other words, you base it— A (interposing) At that time. Not at this time.

42 Q You base your claim on two billion tokens? A That is correct. That was the first order.

Q You mean the first contract? A First contract, yes. The first contract.

Q Who did you talk to in the OPA about this matter? A About what matter?

Q About what we have been talking of, the ration token contract? A At the OPA?

Q Yes. A Mr. Billig, Mr. Carolen and Mr. Esslin.

Q Those three? A Yes, sir.

Q Is that all? A That is all.

Q Who did you talk to at the War Production Board? A I talked to Mr. Savage, Mr. Newcombe, and Mr. Engelhart, New York, WPB.

Q Was he in the New York office? A The other two names were here. I gave you three people.

Q Was there anyone else in the Government that you spoke to in reference to this matter other than those you have named? A Yes, sir.

Q Where and who? A The Office of Emergency Management.

Q Who were they? A Mr. Watson, Mr. McDaniel, and Miss Prince.

43 Q What office were they in? A They were doing the buying.

Q Who is Mr. E. S. West? A He represents the Osborne Register Company, or Wiley for a number of years in New York.

Q Did you talk to him about this matter? A I did.

Q What occurred between you and Mr. West? A What do you mean?

Q Well, I was wondering, what I was trying to do, was to get the whole story and make sure there weren't any other things that happened and there weren't any other people that you would think of afterwards.

I happened to think of Mr. West and I wondered if you had made any agreement with him or anything of the sort?

A I made no agreement with Mr. West.

Q Did he have anything to do with this present controversy that you have with the Osborne Register Company? A I would not know as to how you would interpret it. He represented Osborne in New York for a number of years. What arrangement he has with Wiley I would not know.

Q Did he have any arrangement with you in reference to the ration token contract? A No, sir.

Q You didn't talk to him about the ration token program? A Well, I received a letter here where Mr. Osborne told me I should discuss this with West.

MR. DONOVAN. That was August 24th.

44 THE WITNESS. He says "Please get Ed West to study this letter with you."

BY MR. GORDON:

Q Did you have West study it with you? A What for? I didn't. I am studying it.

Q Then the answer is you did not? A That is right.

MR. GORDON. Well, sir, I think that you may inquire.

CROSS EXAMINATION

BY MR. DONOVAN:

Q I have just one question. I believe your answer when you talked to Mr. Osborne on the 23rd of August and you said something about tacking 15 per cent on that, that was 15 per cent on the small token.

Was any mention made as to the particular size token at that time on the 23rd of August? A The understanding was 15 per cent on any token we were to contract. At that time the plan was still vague and indefinite. They didn't have the right size. They didn't have the right size at that time. At that meeting of September 27th they decided on decimal points and finally arrived at .062.

REDIRECT EXAMINATION

BY MR. GORDON:

Q I don't believe I quite understood the 15 per cent. The 15 per cent was to be added to what figure? A 15 per cent was to be added to any figure that Wiley was going to bid on, and in this case it happened to be on the
45 small one.

Q That is, Wiley was to determine a figure and then add 15 per cent to it and quote the Government the total price? Is that right? A That is right.

Q And then out of what he received from the Government he was to give you the 15 per cent? A That is correct.

Q But there was no agreement as to what the price to be quoted the Government was, because you didn't know at that moment just what that ought to be. Is that right?

MR. DONOVAN. Did you understand that question?

THE WITNESS. I would like to have it again.

MR. GORDON. Read it to him.

(Question read.)

THE WITNESS. What the price ought to be?

BY MR. GORDON:

Q Yes. A This was a closed bid. You could not divulge the price. What am I to say, "yes" or "no"?

Q That is all right, you are explaining it.

MR. DONOVAN. Have you answered the question?

BY MR. GORDON:

Q You were saying it was a closed bid and nobody knew what the price would be. A That is right.

Q But it is your contention that whatever the Osborne Register Company got from the Government would be divided into 115 parts and they would take 100 and you would take 15. A All I knew he was supposed to
46 add on 15 per cent if and when we were bidding.

That was my contract, or else I would have bought myself a factory and I would have manufactured these myself, and he told me it wasn't necessary.

MR. GORDON. I think we are all through, and I am very much obliged to you for coming down.

MAX SILVERMAN.

Subscribed and sworn to this 21 day of March, A. D., 1945.

LLOYD L. HARKINS,
*Notary Public in and for
the District of Columbia.*

*Motion for Summary Judgment
for the Defendant*

48

(Filed August 29, 1945.)

The defendant Osborne Register Company moves that the Court enter a summary judgment for the defendant, under Rule 56 of the Federal Rules of Civil Procedure, and for reason therefor refers the Court to the deposition of the plaintiff Max Silverman filed herein March 27, 1945, and the defendant states as follows:

(1) The pleadings, depositions and admissions on file show that there is no genuine issue as to any material fact concerning the defense that the contract alleged to have been entered into between plaintiff and defendant was invalid. The defendant is thus entitled to judgment as a matter of law.

(2) According to the statements of the plaintiff Max Silverman in his said deposition, the alleged agreement, upon which he has brought this suit, is:

49 (a) against public policy, and illegal, and unenforceable, because it involves an agreement by the plaintiff Silverman not to bid on a Government contract; and/or

 (b) against public policy, and illegal, and unenforceable, because it involves an agreement which has the tendency to add to the amount of a bid under Government contract; and/or

 (c) against public policy, and illegal, and unenforceable, because it involves a commission for obtaining a Government contract; and/or

 (d) too uncertain and vague to constitute a contract between parties; and/or

(e) without consideration from the defendant Max Silverman.

SPENCER GORDON,
701 Union Trust Building
Washington, D. C.

Attorney for Defendant
Osborne Register Company.

Memoranda

50 August 29, 1945

Points and authorities in support of motion for summary judgment for the defendant, filed.

October 9, 1945

Plaintiff's points and authorities in opposition to motion for summary judgment, filed.

October 19, 1945

Defendant's reply to plaintiff's points and authorities, filed.

October 25, 1945

Supplementary memorandum on behalf of plaintiff in opposition to motion for summary judgment, filed.

Affidavit of Plaintiff, Max Silverman

(Filed October 25, 1945)

51 County of New York,
State of New York: ss

I, MAX SILVERMAN, being first duly sworn according to law depose and say that I am the person named as plaintiff in the above entitled cause, and further say as follows:

I entered into an agreement with the defendant, Osborne Register Company, acting through its authorized agent,

Wiley W. Osborne, on August 23, 1943, whereby said defendant and I agreed jointly to submit a bid in said defendant's name to the Office of Emergency Management of the United States Government in response to an invitation to bid to be issued by said Office for the manufacture and delivery to the government of a minimum of 900,000,000 ration tokens to be used by the Office of Price Administration in its program of wartime rationing. Said agreement provided that if a contract for the manufacture of tokens were awarded to the defendant, of the total amount received by said defendant under such contract I was to receive out of the profits an amount equal to fifteen cents (.15) for each unit of 1000 tokens delivered thereunder.

Said agreement further provided that said defendant would manufacture the tokens pursuant to the contract, and I agreed to perform, at my own expense, such services as might be required to ascertain the existence of material

52 which was either non-essential to the war program or such other available material as could be effectively used in the production of tokens, and to take steps to obtain the necessary allocation of such material to the extent required for the manufacture of the product; to confer with government officials and settle all problems relating to the specifications to be made applicable, including my demonstration to the satisfaction of such officials that a certain material considered by me to be most appropriate for the manufacture of such product was in fact the best material to use and that its use would be to the public interest; to arrange with government officials for the approval of defendant's facilities to be used in manufacturing the product and to otherwise establish the defendant's qualifications to assume a contract for the manufacture of the product in the quantity and at the time required by the OPA; and, to assist the defendant generally in obtaining priorities and allocations of machine tools, if necessary, in the event a contract were awarded to it.

On or about October 4, 1943, and pursuant to the terms of said agreement, our bid for the ration token contract was submitted in defendant's name. Although defendant's name was used in making our bid, said defendant and I clearly and unequivocally understood that said bid was a joint bid in which said defendant and I were jointly interested in accordance with the foregoing agreement. Said bid was thereafter accepted by the government and a contract for the manufacture of said tokens was awarded in defendant's name; however, said defendant, in violation of its said agreement with me, breached the same by offering to pay a much smaller sum than I was legally entitled to receive under said agreement and by refusing to pay the amount due me thereunder. Computed on the basis of my said proportionate interest in the profits earned by the defendant under said contract, after the contract price was adjusted, I am legally entitled to receive from said defendant the sum of \$280,000.00

53 and, therefore, claim said amount of the defendant in the above action.

For approximately two months prior to the making of my said agreement with the defendant on August 23, 1943, I had been engaged constantly in working with representatives of the Office of Emergency Management, Office of Price Administration and War Production Board in connection with the development of information relative to the requirements to be adopted by the government for the manufacture of tokens then being discussed in said governmental agencies. By my complete devotion to the development of such information, I probably acquired and developed more information and knowledge with respect to the requirements of the government for the production of ration tokens than any other source in the United States and by virtue thereof neglected my other business activities. Such work was in the regular and ordinary course of my business, as I was then engaged in the per-

formance of contracts with the Office of Price Administration for the furnishing to it of certain types of badges, and with the American Red Cross for the furnishing to it of blood donor badges. It was my regular practice to bid on government contracts in my own name and to then make sub-contracts with fabricators and processors, among whom the defendant in this case is one, for the necessary fabrication and processing on the basis of quotations theretofore furnished by them to me.

Accordingly, during said period of approximately two months prior to the making of my agreement with the defendant, my work in connection with the proposed contract for the manufacture of ration tokens was likewise being performed in the belief that I would personally bid for the contract and then subcontract in the customary manner with the defendant or with others for fabrication and processing. Shortly prior to my agreement with the defendant of August 23, 1943, certain basic requirements regarding the manufacture of said ration tokens began to take shape. Proceeding in the usual manner, I thereupon

communicated with the defendant to obtain from it
54 a quotation of the amount it would charge me to manufacture the required ration tokens in certain sizes. On the basis of such quotations furnished me by said defendant, I computed the price I would charge the government in the bid which I contemplated submitting in my own name, by adding 15% to the prices quoted to me by the defendant, said 15% representing a reasonable allowance to cover the expenses I had incurred, the work performed and profit. On August 21, 1943, I was informed by officials of Office of Emergency Management that because I did not own the required facilities for the manufacture of the ration tokens an award of a contract could not be made in my name. I promptly communicated with the defendant on August 23, 1943, and informed said defendant of the foregoing information, discussed the same

fully with it and, at the suggestion of said defendant, we thereupon agreed to join in bidding for the contract and also agreed upon the other terms as stated above.

The extent of my interest in the proceeds of the contract for the manufacture of tokens, if awarded to the defendant, is as stated above, and that interest is precisely the same proportion that I would have received had the bid been submitted by me in my own name as originally contemplated. Accordingly, my agreement with the defendant was such that we agreed to join our efforts and join in submitting a bid in defendant's name, and did not involve any promise or consideration, or any other understanding or agreement, to the effect that I would not bid. Nor did my said agreement provide for increasing the amount of a bid on a government contract, since said bid did not exceed the same bid which I had previously computed and which it was my intention to make in my own name before I was informed that an award could not be made in my name because of non-ownership of the required facilities. Although my compensation was contingent upon the defendant being awarded the contract to manufacture
 55 the tokens and there being proceeds therefrom, my said agreement with the defendant did not involve any agreement, promise or understanding that I would be paid a fee contingent upon securing a government contract for the defendant. The final award of such contract was dependent upon the result of competitive bidding therefor.

Accordingly, I aver that defendant has breached its agreement with me and is justly indebted to me in the sum of \$280,000.00 with costs.

MAX SILVERMAN

Subscribed and sworn to before me, this 23rd day of October, 1945. *Leonard Blackman, Notary Public, Queens County, Clerks 3482, New York Co., Clerk #1283.*

M E M O R A N D U M

OCTOBER 26, 1945

Supplementary memorandum on behalf of defendant, filed.

56

Memorandum Opinion

Plaintiff, by presenting no additional *facts*, cannot be heard to qualify, explain or negative what he has admitted categorically by way of deposition. Mere denials are not sufficient.

There being, therefore, no real genuine issue of fact, a Motion for Summary Judgment will properly lie.

The general principle laid down broadly in *Tool Co. vs. Norris*, 2 Wall. 45, 54 is applicable. The tendency of such an agreement as we have here, apart from other consideration, was to have the government pay fifteen percent more than it would presumably have paid under the circumstances. Such a contract is illegal and void on the ground of public policy and as a consequence the courts have no alternative in such a situation but to so declare it. True, the defendant reaps the benefit, but courts cannot be concerned with that aspect of such matters, for reasons that are obvious and have been expressed judicially time and again. They, therefore, leave the parties where they find them.

The Motion for Summary Judgment is granted. Counsel will prepare proper order.

MATTHEW F. MCGUIRE
Justice

November 14, 1945

Judgment For The Defendant

Upon consideration of the motion of the Defendant Osborne Register Company that the Court enter a summary judgment for the Defendant under Rule 56 of the Federal Rules of Civil Procedure, and after argument thereon by counsel, and the Court having filed a memorandum opinion dated 14 November, 1945, it is by the Court this 19th day of November, 1945.

ADJUDGED AND ORDERED, That the motion of the Defendant Osborne Register Company for summary judgment be, and the same is hereby, granted, and that the complaint of the Plaintiff Max Silverman against the Osborne Register Company be, and the same is hereby dismissed, with costs to be paid by the Plaintiff.

MATTHEW F. MCGUIRE

Justice

Seen:

NEWMYER & BRESS

by DAVID G. BRESS

Attorneys for Defendant

Notice of Appeal

Notice is hereby given this 12th day of December, 1945, that MAX SILVERMAN, Plaintiff, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 19th day of November, 1945 in favor of OSBORNE REGISTER COMPANY, Defendant, against said MAX SILVERMAN.

NEWMYER & BRESS

By DAVID G. BRESS

Attorneys for Plaintiff

1001 - 15th Street, N. W.

Washington, D. C.

M E M O R A N D U M

DECEMBER 12, 1945

Bond (\$250.00) on appeal of plaintiff approved and filed.

59

Statement of Points

The plaintiff relies on the following points on the appeal to the United States Court of Appeals for the District of Columbia from the judgment for the defendant entered herein:

1. The trial court erred in granting defendant's motion for summary judgment.

2. The trial court erred in ruling that the contract sued on was illegal and void on the ground of public policy.

3. The trial court erred in applying the principle of *Tool Co. v. Norris*, 2 Wall. 45.

NEWMYER & BRESS

By DAVID G. BRESS
*Attorneys for Plaintiff*1001 - 15th Street, N. W.
Washington, D. C.

BRIEF OF OSBORNE REGISTER COMPANY,
APPELLEE.

United States Court of Appeals

DISTRICT OF COLUMBIA.

—
No. 9185
—

*United States Court of Appeals
for the District of Columbia*

FILED APR 20 1946

Joseph W. Whitcomb

CLERK

MAX SILVERMAN,
Appellant,

v.

OSBORNE REGISTER COMPANY, A Corporation,
Appellee.

—
SPENCER GORDON,
GERHARD A. GESELL,
ELEANOR SESSOMS,
*Attorneys for Osborne Register
Company, Appellee.*

COVINGTON, BURLING, RUBLEE,
ACHESON & SHORB
Washington, D. C.

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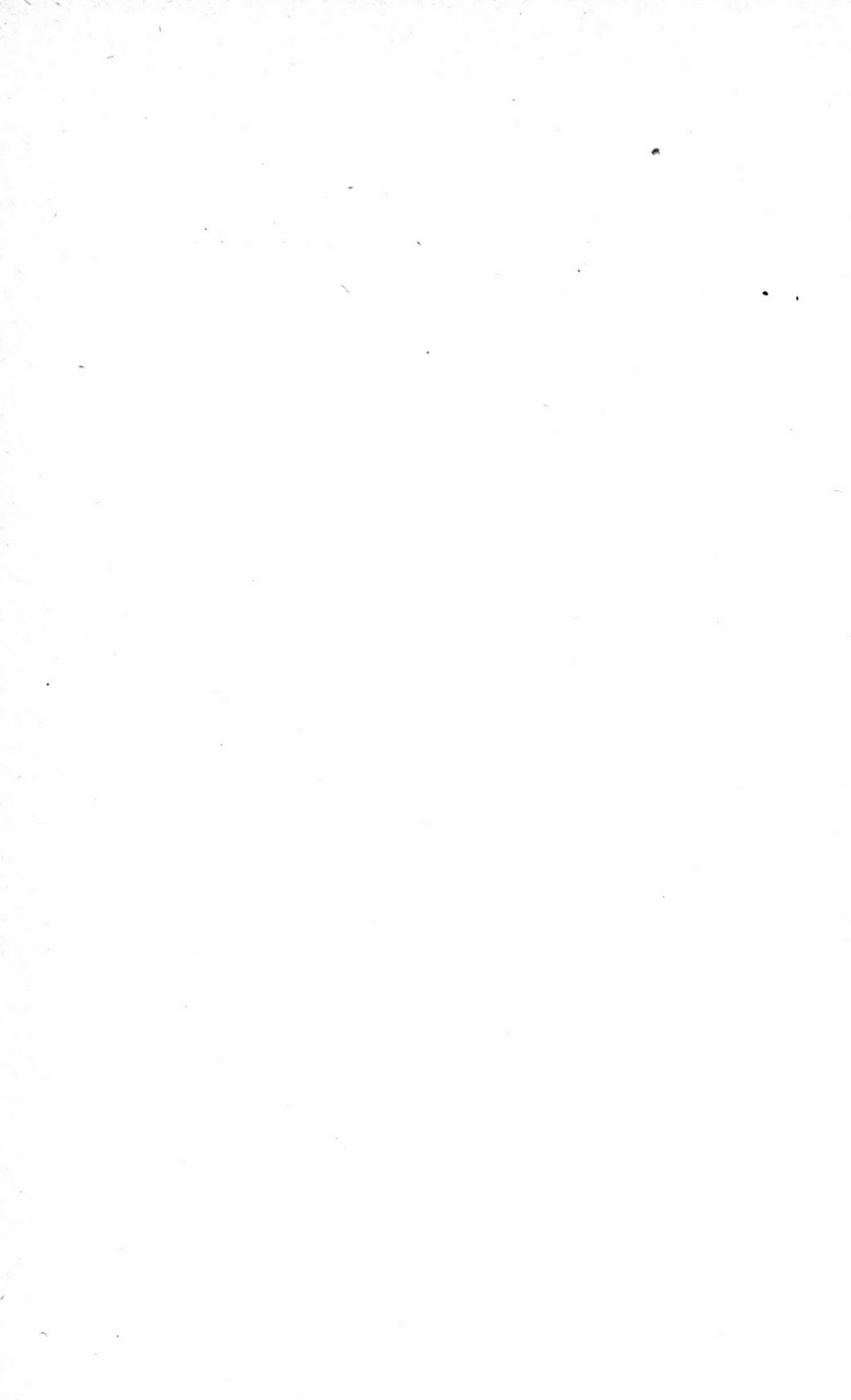
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United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9185

MAX SILVERMAN,
Appellant,

v.

OSBORNE REGISTER COMPANY, A Corporation,
Appellee

**BRIEF OF OSBORNE REGISTER COMPANY,
APPELLEE.**

STATEMENT OF THE CASE

Appellant, Mr. Silverman, brought this action in the court below for breach of contract claiming \$280,000 from appellee as owing under an alleged agreement between appellant and appellee which he vaguely characterized in his complaint as involving the consummation of a contract between appellee and the United States for the manufacture of ration tokens. After taking appellant's own deposition and relying solely upon the deposition, appellee moved for summary judgment on the ground the

alleged contract was void as against public policy.* After the hearing on motion for summary judgment, appellant filed an affidavit which the trial justice stated in his subsequent Memorandum Opinion presented no genuine issue of a material fact but merely denied facts to which appellant had testified on his deposition. Appellee's motion for summary judgment was granted (App. 41)** and appellant seeks review of the order dismissing the complaint (App. 42).

The nature of the alleged agreement upon which appellant founded his claim remained vague and indefinite until appellant's deposition was taken by appellee for discovery on March 2, 1945. This deposition purports to be a complete statement of Mr. Silverman's claim. Mr. Silverman testified that his contract was made with Mr. Wiley Osborne (App. 13, 14, 36, 37); that he had no conversations with Mr. Osborne during the period involved in this suit other than those which he described in his deposition (App. 27, 28); that there was no formal contract in writing (App. 27); and that he had told the complete story of the transaction to the best of his recollection (App. 27).*** Appellant cannot be heard to controvert the statements of his deposition.

The facts established by the deposition are clear. Appellant is in the business of selling pins and souvenirs (App. 8), with an office at 120 West Forty-second Street, New York City (App. 9). His force consists of a secretary, stenographer and himself, with another man who does a little work from time to time, but is not a regular

* Appellee denies that it had any contract with appellant. For the purposes of its motion for summary judgment, appellee is relying solely on appellant's deposition, which must be taken as true on this appeal.

** All references are to the Joint Appendix printed at the back of appellant's brief.

*** Appellant takes the position for the first time on appeal that certain correspondence between him and Wiley Osborne was not filed with the deposition although identified at the time the deposition was taken (Appellant's brief, Pg. 26). While these papers are not before the court, they add nothing to the material facts developed in the deposition and could, of course, have been filed by appellant in the court below if tending in any way to create a material issue of fact.

employee (App. 9). Appellant has no factory (App. 9). The Osborne Register Company is a manufacturer of tokens, coins and emblems. (App. 2, 5). Mr. Silverman purchases his pins and souvenirs from such manufacturers and makes a profit on resales (App. 9, 10).

The character of appellant's former dealings with the Osborne Register Company is shown by their arrangement for the manufacture and sale of Red Cross blood donor pins. Mr. Silverman described this transaction as follows:

"Now in so far as the Red Cross pin, I have placed an order for a million pins and buttons with the Osborne Register Company. (App. 9.)

" . . . and on this Red Cross blood donor pin, may I add that I bought this pin and the buttons from Osborne Register Company for about \$30 some odd a thousand, and while I spent an additional \$10 on them I realized \$60 odd a thousand. That made it quite a handsome profit." (App. 10.)

In stating his contention of how the alleged contract on which he now sues was made, Mr. Silverman said:

" . . . on or about the 20th day of August, 1943, I telephoned Osborne. I told Wiley to send me some fiber tokens, some about the size of a little less than a dime, and some about the size of a nickel or a little over a nickel or a little lower than a nickel, and give me his quotation, and see that he mails me this by air mail as I will need same the following day, and give me his price so that I can bid on a contract.

"On the 21st day of August I received a letter quoting me prices and enclosing some samples." (App. 11, 12.)

Mr. Silverman then described his discussions with officials of the OPA on August 21, 1943, and said that these officials were much impressed but that they finally told Mr. Silverman that he could not bid for the ration token contract because he did not have a factory (App. 13). Mr. Silverman continued:

"He then asked me where my factory was and I told him I had no factory. He said if you haven't got a factory you won't be able to bid, and I asked him why I would not be able to bid, I am now delivering a badge pin to you, and I have an order for a quarter of a million pieces, and you are pleased with the production and you can check that with your purchasing department and Office of Emergency Management, they will bear me out.

"He said, 'I don't care anything about the badge business, this is one job if I have anything to do with it, it will be all from the manufacturer,' and I asked him his reason and he said, 'This job is so big that it is comparable to a Government mint.'

"He said 'We will have to first examine the plant to make sure that we can have our own guards, we can have surveillance over this particular plant, we almost would have to run the plant in order to protect the manufacturer of this article and see that it doesn't get into the hands of the people who are working at it, or that the tools and dies will not be stolen out of these, because this is going to be treated the same as currency is treated, and therefore it will make it impossible for you to bid on this contract.' " (App. 13)

Mr. Silverman went on to say:

"This was Saturday night. I then left for New York and got home on Sunday. On Monday morning from my office I phoned Osborne and said:

" 'Wiley, I received the letter and prices and your samples Saturday afternoon, and I sat around all Saturday afternoon until I could see these proposals at the Office of Price Administration, and after explaining to them and they being enthusiastic with the goods I ran into a hitch,' and he said 'What was the hitch,' and I explained to him that what Mr. Carolen told me and I said 'I better go out and get myself a factory, or else a manufacturer to do the bidding for me.'

"Whereupon Wiley said, 'Are you crazy? What do you have to have any manufacturer do the bidding for you? Didn't I tell you that if you could get them to

use fiber that I had no deal on with Scoville because the only deal I have with Scoville is on pressed paper-board, and now if you get them to the point where they are going to use fiber, O. K., Max, I will do the bidding. What do you want me to tack on?' And I said '15 per cent above the price you quote me in your letter of August 20th,' he said 'That is fine, that suits me to perfection,' and I requested him to send some samples to the attention of Mr. S. M. Billig at the Census Building, and he told me that 'I will carry on from that point and report to me from time to time.' " (App. 13, 14)

Mr. Silverman repeated:

"He told me 'What do you want to tack on?' I said '15 per cent above the cost,' and he said O. K. and he said 'I will do the bidding.' " (App. 15)

Mr. Silverman then testified that he kept in touch with developments (App. 16), that he took Mr. Esslin of the OPA to Cincinnati to see the Osborne Register Company plant (App. 17), and that he then went back to Washington and got a lot of people to know that he "was interested" (App. 19). He testified:

"I saw the possibility of a big contract that I could grab off and make some money, and I spent all my time and energy on it." (App. 20)

The opening of bids was on October 4, 1943. (App. 21) The Osborne Register Company was the successful bidder. (App. 22).

Mr. Silverman stated his contention as follows:

"Q. As I understand it your contention is that Mr. Osborne promised to add to his bid 15 per cent of the price he had quoted you for small size tokens, that is, 15 per cent over \$1.05 per thousand, and in that you were to get the 15 per cent. Is that right?

"A. That is correct.

"Q. That is what you contend?

"A. I don't contend. He agreed." (App. 31)

In response to questions by his attorney Mr. Donovan, Mr. Silverman said:

"Q. I have just one question.

"I believe your answer when you talked to Mr. Osborne on the 23rd of August and you said something about tacking 15 per cent on that, that was 15 per cent on the small token.

"Was any mention made as to the particular size token at that time on the 23rd of August?

"A. The understanding was 15 per cent on any token we were to contract. At that time the plan was still vague and indefinite. They didn't have the right size. They didn't have the right size at that time. At that meeting of September 27th they decided in decimal points and finally arrived at .062." (App. 33)

On redirect examination, Mr. Silverman testified:

"By Mr. Gordon:

"Q. I don't believe I quite understood the 15 per cent. The 15 per cent was to be added to what figure?

"A. 15 per cent was to be added to any figure that Wiley was going to bid on, and in this case it happened to be on the small one.

"Q. That is, Wiley was to determine a figure and then add 15 per cent to it and quote the Government the total price? Is that right?

"A. That is right.

"Q. And then out of what he received from the Government he was to give you the 15 per cent?

"A. That is correct.

"Q. But there was no agreement as to what the price to be quoted the Government was, because you didn't know at that moment just what that ought to be. Is that right? (App. 33, 34)

"... Mr. Donovan. Have you answered the question?

"By Mr. Gordon:

"Q. You were saying it was a closed bid and nobody knew what the price would be.

"A. That is right.

"Q. But it is your contention that whatever the Osborne Register Company got from the Government would be divided into 115 parts and they would take 100 and you would take 15.

"A. All I knew he was supposed to add on 15 per cent if and when we were bidding. That was my contract, or else I would have bought myself a factory and I would have manufactured these myself, and he told me it wasn't necessary." (App. 34)

Thus, the testimony of appellant was that it was agreed between him and Osborne on behalf of the Osborne Register Company that in consideration of appellant's refraining from acquiring a factory of his own and refraining from bidding on the ration token contract, the Osborne Register Company would increase its proposed bid to the Government by 15 per cent and would pay the 15 per cent to appellant if its bid was accepted. Although not expressly stated, it is implied that, as an additional consideration, appellant would aid in securing the contract for the Osborne Register Company.

SUMMARY OF ARGUMENT

The alleged agreement upon which appellant relies as established by his own deposition is illegal and void as against public policy since appellant's compensation for his activities in attempting to procure the ration token contract from the Government was contingent upon the successful award of the contract. Public policy is equally offended by the fact that the alleged agreement provided for improperly increasing the amount of the bid on a public contract in return for a promise by appellant not to compete by bidding for the same contract.

Appellant's contention that his contract with appellee created a joint adventure is not supported by the evidence.

The trial court did not err in granting appellee's motion for summary judgment. There was no genuine issue

of a material fact presented at the time the motion was filed or by appellant's subsequent affidavit which contained mere conclusions and arguments.

ARGUMENT

- (1) The alleged agreement is illegal and unenforceable as against public policy because it required the payment of a contingent fee to appellant for his securing a contract from the United States Government.**

Appellant's deposition demonstrates that any amount owing under the alleged contract was contingent upon the United States awarding the ration token business to appellee Osborne. It seems to have been clearly implied in the alleged contract that appellant would attempt to secure the Government business for appellee since after appellant was assured that 15 per cent would be added to the bid price for him, appellant actively solicited the contract for Osborne with Osborne's knowledge. To use his own words, appellant stated: "I saw the possibility of a big contract that I could grab off and make some money and I spent all my time and energy on it". (App. 20) This took the form, among other things, of appellant accommodating a Government official on a visit to inspect the plant in Cincinnati (App. 17-18) and in "digging in Washington for information" to get a lot of people to know he was "interested". (App. 19)

The contingent nature of the fee payable to appellant in part for his efforts to secure the Government ration token business rendered the alleged contract upon which appellant's claim is founded illegal and wholly void. The Trial Justice in his Memorandum Opinion correctly stated:

"The general principle laid down broadly in *Tool Company v. Norris*, 2 Wall. 45, 54 is applicable. The tendency of such an agreement as we have here, apart from other questions, was to have the Government pay 15 per cent more than it would presumably have

paid under the circumstances. Such a contract is illegal and void on the ground of public policy and as a consequence the courts have no alternative in such a situation but to so declare it." (App. 41)

The decision in the *Tool Company Case* states in specific terms the underlying considerations of public policy which apply in a situation such as involved in the case at bar, namely that a special contract for the solicitation of business from the Government which involves compensation payable contingent upon success has the inherent character and tendency to provoke improper conduct and is therefore void as against public policy regardless of the means contemplated or actually used. The determination there made has never been overruled and the decision is controlling.

In that case the Tool Company had entered into a contract with the United States to deliver 25,000 muskets. The contract was procured through the exertions of Norris, the plaintiff, upon a previous agreement with the Tool Company that in case he obtained a contract of this kind "he should receive compensation for his services proportionate to its extent". Norris, having been instrumental in securing the musket contract, sued the Tool Company for compensation. It was held, however, that the contract between Norris and the Tool Company was against public policy and illegal. Mr. Justice Field, speaking for a unanimous court, said:

"The question, then, is this: Can an agreement for compensation to procure a contract from the Government to furnish its supplies be enforced by the courts? We have no hesitation in answering the question in the negative. All contracts for supplies should be made with those, and with those only, who will execute them most faithfully, and at the least expense to the Government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the Government. No other con-

sideration can lawfully enter into the transaction, so far as the Government is concerned. Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction, is against public policy. That agreements, like the one under consideration, have this tendency, is manifest. They tend to introduce personal solicitation, and personal influence, as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds. (Pg. 54)

* * * * *

“Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception.

“There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both, is the direct and inevitable result of all such arrangements. (Pg. 55)

* * * * *

“Other agreements of an analogous character might be mentioned, which the courts, for the same or similar reasons, refuse to uphold. It is unnecessary to state them particularly; it is sufficient to observe, generally, that all agreements for pecuniary considerations to control the business operations of the Government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country.” (Pgs. 55-56)

To the same effect is *Crocker v. United States*, 240 U. S. 74 (1916), where the Court considered in passing a con-

tract quite analogous to the alleged contract here involved. The Postmaster General, by public advertisement, solicited bids for furnishing letter carriers' satchels. Thereafter one Lorenz entered into a contract with a company whereby he agreed to assist it in securing the contract. He was to receive one dollar in full payment of his services unless the company got the contract, in which event he was to receive all profits arising out of the same in excess of twenty-five cents on each satchel. As to this contract the Court, relying upon the *Tool Company Case* and *Marshall v. Balt. & Ohio R. R.*, 16 How. 314, (1853) stated in the course of its opinion:

"We are of opinion that in the transactions out of which the claim arose there was an obvious departure from the recognized legal and moral standards. It began when the company employed Lorenz, upon a compensation contingent upon success, to secure the contract for furnishing the satchels, and it persisted until its discovery by the Postmaster General led to the rescission of the contract. Because of their baneful tendency, as here illustrated, agreements like that under which Lorenz was employed are deemed inconsistent with sound morals and public policy and therefore invalid." (Pg. 78)

It should be noted that this agreement did not on its face involve any improper solicitation, the tendency of the agreement to induce the elements of personal solicitation and influence being sufficient to make it void. Nor did the circumstance that the Government contract was to be awarded on competitive bidding—a fact upon which appellant here places great stress—affect the application of the basic consideration of public policy. Even under competitive bidding such a contract may work directly against the public interest and no clearer proof of this can be found than in the present case where the agreement not only increased the bid to the Government but may well have influenced the selection of the material from which ration tokens were made.

Other decisions of the United States Supreme Court reflecting consistent application of the rule in the *Tool Company Case* are:

Marshall v. Baltimore and Ohio R. R., 16 How. 314 (1853);

Hazelton v. Sheckells, 202 U. S. 71 (1906);

Oscanyan v. Winchester Repeater Arms Co., 103 U. S. 261 (1880);

Trist v. Child, 21 Wall. 441 (1874).

This Court has likewise recognized the corrupting tendency of contingent contracts such as that here involved and declared them void as against public policy.

Noonan v. Gilbert, 63 App. D. C. 30, 68 F. (2d) 775 (1934);

Gesellschaft Fur Drahtlose Telegraphie M. B. H. v. Brown, 64 App. D. C. 357, 78 F. (2d) 410 (1935); cert. den. 296 U. S. 618 (1935).

The latter case involved a suit to recover for legal services performed by plaintiff. The property of the defendant had been seized in part by the United States Government and the remainder by the Alien Property Custodian, and the defendant held claims which were not then recognized as valid. The defendant employed the plaintiff to take such steps as might be necessary to recover the property for a fee equal to 25 per cent of the first \$100,000 and reasonable compensation out of any amount recovered in excess of that. The plaintiff performed a great deal of work and recovered a large amount of property. He obtained a judgment for \$250,000 in the court below. This was, however, reversed by the Court of Appeals on the ground that the contract was illegal. The Court said:

“In determining the question of public policy, we are not so much concerned with what was done by the plaintiff, as by what the terms of the contract afforded him and his associates an opportunity of doing.”

The Court quoted from *Providence Tool Company v. Norris*, 2 Wall. 45 (1864), and *Hazelton v. Sheckells*, 202 U. S. 71 (1906), and held that the contract was illegal. The Court said:

“It must, however, not be understood that we are holding all contingent fee contracts for the enforcement of claims against the government, or even for the procuring of legislation, void as against public policy. There is a sharp distinction between contingent-fee contracts for the prosecution of claims against the government which are in the nature of debts or contract claims, and *contingent contracts for procuring favors through contracts from the heads of government departments*, or the procuring of general remedial legislation, authorizing a contract or granting advantages or benefits to which, prior to the enactment, the contractor has no existing legal claim. In the latter instance such contracts *are held void as against public policy*. In the former the head of a department or Congress act in a quasi-judicial capacity in adjusting an individual debt or claim.” (Pg. 360) (Emphasis supplied)

The principal cases upon which appellant relies do not, as he contends, establish any departure from the basic doctrine announced in the *Tool Company* decision. The language from *Oscanyan v. Winchester Repeater Arms Company*, 103 U. S. 261 (1880), is not in point. Here a contingent fee contract involving the procuring of a sale of fire arms to the Turkish Government was involved and voided as against public policy. In discussing the matter the Court, in the opinion, recognized the propriety of paying one who acquaints the Government with goods for sale the established brokerage commission which is paid by regular custom in the course of the particular business involved. Clearly the case at bar is not of this character for not only were the goods specifically manufactured to meet a particular war-time need, but appellant's activities were not those of a bona fide salesman regularly solicit-

ing orders for an established product in the normal course of business in accordance with established custom. Appellant undertook to procure a specific contract. Cf. *Reynolds v. Goodwin-Hill Corp.*, C. C. A. 2, April 3, 1946, 14 U. S. Law Week, 2597.

Valdes v. Larrinaga, 233 U. S. 705 (1913), is also not entitled to the authoritative position which appellant gives it in his brief for there was involved solely the rendering of technical or professional assistance in connection with the obtaining of a water franchise for the purpose of developing electric power in Puerto Rico and not an undertaking to perform governmental solicitation. Finally, *Steele v. Drummond*, 275 U. S. 199 (1927), cannot be given the significance which appellant urges when the facts at issue are examined closely. It appears from the decision that Steele entered into a detailed business arrangement with Drummond for the extension of a railroad requiring both parties to perform numerous services by way of procuring charters, conveying rights of way, furnishing track material, delivering ties, operating trains, etc. Drummond performed substantially and expended considerable sums which were wholly lost by reason of Steele's non-performance. He sued Steele who defended on the ground that the contract was against public policy by reason of a provision in the contract whereby as an incidental but necessary part of the business arrangements Drummond undertook to procure ordinances from the Town of St. Andrews. The Court was obviously unwilling to extend the doctrine of the *Tool Company Case* to relieve Steele of his clear legal responsibility where the obtaining of the ordinance was merely a technical detail in connection with carrying out a purely business undertaking between the parties. That the Court did not consider that it had in any way diluted or modified the doctrine of the *Tool Company Case* is demonstrated by the fact that in a very recent decision this case has been cited by the Court itself as standing for the proposition that "contingent fee contracts to secure Government business

for the employer of the recipient have been held invalid because of their tendency to induce improper solicitation of public officers and the exercise of political pressure". *Muschany v. United States*, 324 U. S. 49, 64 (1945). Appellant's remaining cases are taken almost entirely from state reports and are not pertinent here. State courts have taken varying views on this question, many following the doctrine of the *Tool Company Case*, 46 A. L. R. 196, 203; 148 A. L. R. 768, 769, but the federal rule, to say nothing of the rule in this jurisdiction, is controlling here. *O'Connor v. Hudson River Day Line*, 269 App. Div. 960, 58 N. Y. S. (2d) 175 (1945); *United States v. Allegheny County*, 322 U. S. 174, 183 (1944).

The alleged contract clearly contemplated the appellant would procure the Government ration token business for appellee and be paid only if successful. Such a contingent arrangement is illegal and wholly void.

(2) The alleged agreement is illegal and unenforceable as against public policy because it provided for improperly increasing the amount of a bid on a government contract in return for a promise by appellant not to bid on the same contract.

Appellant's own deposition leaves no doubt but that his alleged agreement with appellee resulted from his promise not to bid on the prospective ration token contract and appellee's promise in return to "tack on" 15 per cent to his bid for appellant. This arrangement stifled competition and added to the cost of the contract to the government.

Appellant had by his contacts stirred up interest in a fiber ration token and realized he would have to go out and get a factory or else get a manufacturer to bid for him (App. 14). Appellee was itself seeking the contract and sending samples of another material to the government agencies concerned (App. 15). Appellant made his arrange-

ment with appellee to do the bidding and refrained from connecting with a factory to place the bid himself. (App. 13, 34) That this arrangement also added to the bid is clear for appellant testified that 15 per cent was tacked on to the bid by mutual agreement as the amount to be paid appellant (App. 13, 14, 15, 31, 33), and as the court below properly noted, the tendency of the agreement was "to have the government pay fifteen per cent more than it would presumably have paid under the circumstances" (App. 41).

The illegality and invalidity of such an agreement has long been recognized, both because of its effect on competition and the extra cost it places upon the government.

Thus, in Williston on Contracts (Rev. ed. 1937) we find the following statement in Section 1663:

"A bargain not to bid at an auction or other competitive sale, or on the competitive award of a contract, is illegal and unenforceable by either party if the primary purpose was to stifle competition and secure an unfair advantage over the vendor or the person awarding the contract. Bargains directly tending to chill competition, such as one that the successful bidder shall pay a percentage to his competitors, or employ a possible competitor to perform the contract at a pre-agreed price, constitute illegal stifling of competition."

And in the Restatement of the Law of Contracts (1932), we find the following:

"Section 517. Bargain to Stifle Competition in Competitive Bidding.

"A bargain not to bid at an auction, or any public competition for a sale or contract, having as its primary object to stifle competition, is illegal.

"ILLUSTRATIONS:

* * * * *

"4. A advertises for bids for the construction of a building. B, a contractor, promises \$1000 each to C and D if they will refrain from bidding. They do so. The bargains are illegal.

* * * * *

"6. A, B, C and D, building contractors, agree with one another to form the X association and that in future bids for the award of building contracts the successful bidder shall pay the X association 2 per cent. of the gross amount of the price fixed in the contract awarded. The agreement between A, B, C and D is illegal."

There are many decisions to this effect, including:

Atlas National Bank v. Holm, 71 Fed. 489 (C. C. A. 7th 1896);

Pittsburgh Dredging & Construction Co. v. Monongahela & Western Dredging Co., 139 Fed. 780 (W. D. Pa. 1905);

In re Salmon, 145 Fed. 649 (W. D. Mo. 1906);

Reinstine v. Rosenfield, 111 F. (2d) 892 (C. C. A. 7th 1940);

City of Oakland v. California Const. Co., 15 Cal. (2d) 573, 104 P. (2d) 30 (1940);

Cianciarulo v. Caldarone, 30 A. (2d) 843 (R. I. 1943).

See also *McMullen v. Hoffman*, 174 U. S. 639 (1899) in which the underlying considerations of public policy applicable in a situation such as this are well presented.

The very concept of public bidding assumes that there will be open competition for the business, and any agreement having the tendency to prevent such competition operates contrary to the public interest. In this instance competition was not only stifled but an undertaking was made in connection therewith which directly and materially increased the bid which was made to the Government and hence the cost to the Government. Under such circumstances the direct injury to the public is patently clear, and the entire understanding must be declared void. Indeed, a mere arrangement increasing a bid to the Government even

without an agreement which stifles competition, would be sufficient to make the contract illegal.

Thus, in *Kentucky Association of Highway Contractors v. Williams*, 213 Ky. 167, 280 S. W. 937 (1926), the rules of the association provided for the payment to the association of a fee of one-fourth of one per cent on all federal, state and county highway work in Kentucky contracted for by members of the association. Williams, a member of the association, was awarded three large road contracts by the State Highway Commission, but declined to pay the fees based on two of these, and defended suit by the association on the ground that the by-law was against public policy and illegal. It was argued that the association was a lawful one and the fee a reasonable one, but it was held that the by-law had a tendency to make members of the association add to their bids on public contracts and was therefore void. The opinion stated:

“Human nature is a thing of which courts will take judicial knowledge, and a part of it is to protect one’s self from expenses and financial burdens, as much so as possible, and to shift or avoid them whenever an opportunity exists. The contract here involved directly creates that opportunity; i. e., it creates a stimulus on the part of the member contractor to add to his bid on all public contracts the amount that the association’s contract with him forces him to pay to it, and to thereby recoup that amount, for his own protection, from the public authority letting the contract. The contract sued on can have no other tendency, since it is a *direct* levy by plaintiff of a tax on the contract price of its members made with the public and to be paid out of public funds, and the purpose which it tends to accomplish with that tax after it is collected has nothing whatever to do with the question.

* * * * *

“Without further elaboration, it is our conclusion that the contract here involved is unmistakably against public policy, and the court did not err in so adjudging.”

Constructors Assn. of Western Pennsylvania v. Seeds, 142 Pa. 59, 15 A. (2d) 467 (1940), involved facts very similar to those in the *Kentucky Association Case*. In this instance the association was composed of contractors of heavy building and construction work. Its by-laws provided that the members pay to the association one-half of one per cent on the gross amount of each contract secured in the area. The defendant had been awarded a contract to construct a dam for the United States Government, and declined to pay dues on the contract price, defending suit on the ground that the by-law was invalid. The Court cited Section 517 of the Restatement of the Law, Contracts, which we have heretofore quoted in this brief, and cited the *Kentucky Association Case*. It was held that the by-law was invalid and the suit was dismissed, the Court saying:

“The by-law before us, as the one in the Kentucky case, has an undoubted tendency to cause members to add the percentage payable to the association to their bid and thus in effect tax all contracts public and private to the extent of the percentage added.”

To the same effect is *Associated Wisconsin Contractors v. Lathers*, 235 Wis. 14, 291 N. W. 770 (1940), where an association sued to collect a membership assessment from a contractor on the basis of one-fourth of one per cent of the amount of each highway contract secured during the year. It was held that a demurrer to the complaint should have been sustained, and the suit was dismissed, the court saying:

“An agreement limited to having a common treasury into which a certain percentage of the revenue from public contracts is to be paid falls under the condemnation of the rule protecting freedom and integrity of competition in securing contracts for public works . . . the inference is that the expenses will be allocated to the bids and will tend to increase the expenditure on the part of the public with relation to those contracts. If that inference is not repelled by

allegations of fact showing that such is not the case, the complaint is then insufficient for failure to state a cause of action."

The illegality of the alleged contract in the case at bar is even clearer than in the three cases just cited. There the contracts were held invalid merely because they "had a tendency" to increase the amount of a bid on a government contract, in two cases one-fourth of one per cent and in the other case one-half of one per cent. Here there is more than a "tendency". The testimony is that there was an express agreement to add fifteen per cent to a bid on the ration token contract. We submit that such an agreement is clearly illegal particularly where the increased cost was in part the direct result of appellant's refraining from bidding himself.

(3) No Joint Venture Was Established.

Appellant seeks to avoid the illegality of the alleged contract by claiming that it was a joint enterprise or joint adventure entered into for an honest and reasonable business purpose. But his deposition negatives any theory that his alleged arrangement was in fact a joint venture, the essential elements of which have been succinctly stated as follows:

"It may be stated in general terms that the relation of joint adventurers is created where two or more persons combine their money, property, or time in the conduct of some particular line of trade, or for some particular business deal, agreeing to share jointly, or in proportion to the capital contributed, in the profits and losses, assuming that the circumstances do not establish a technical partnership. It may also be pointed out that the courts are disinclined to hold that an arrangement amounts to a joint adventure, if the circumstances are such that the creation of that relationship would carry with it consequences which are offensive to public policy. (30 Am. Jur. 681)

“ . . . An agreement, express or implied, for the sharing of profits is essential to the creation of a joint venture, . . . ” (30 Am. Jur. 682)

While appellant asserted in his affidavit that the alleged agreement involved the payment to him “out of profits” of an amount equal to 15 cents for each unit of 1,000 tokens delivered, this conclusion is not supported by the facts developed in appellant’s deposition. It is perfectly apparent from that deposition that the alleged arrangement did not involve any sharing of profits whatsoever. The agreement, according to Mr. Silverman’s own testimony, was that Osborne would add 15 per cent to whatever bid he was going to make and would pay this 15 per cent to Silverman. Thus Silverman stated:

“ . . . 15 per cent was to be added to any figure that Wiley (Osborne) was going to bid on.” (App. 33)

Later the fact that this 15 per cent was to be paid outright, regardless of the financial results from the operation of the contract, was made crystal clear in the following questioning:

“Q That is, Wiley was to determine a figure and then add 15 per cent to it and quote the Government the total price? Is that right?

“A That is right.

“Q And then out of what he received from the Government he was to give you the 15 per cent?

“A That is correct.” (App. 33)

Not only was there no agreement to share profits but there was no undertaking by appellant under which he was in any way obligated to share or bear the burden of any losses which might result from the contract. According to Mr. Silverman, the arrangement was simply that he was to get his 15 per cent if the contract was awarded, and he had no responsibility whatsoever for the performance under the contract or for losses or liabilities incurred.

A reading of Mr. Silverman's deposition makes clear that he was not a joint adventurer at all but an independent contractor. His testimony establishes a very similar relationship to that presented in *Wright v. Fissell*, 92 N. J. Eq. 508, 113 Atl. 699 (1921). The complainants had agreed to use their influence to obtain government contracts for the defendant in consideration of one-half of the profits on all contracts so procured. The court, holding the agreement void as against public policy, ruled that the complainants were independent contractors.

"The complainants were not, as claimed, co-partners with the defendant, promoting a common enterprise. They were not to share losses as well as profits, and there was no privity between them and the government. They were not attorneys, agents, or employees, nor were they other than independent contractors, dealing with the defendant for half his profits in consideration of their influence, and the enlisted influence of others, with the government's officials."

Goodwin v. Camp, 295 Fed. 785 (CCA 6th, 1924), is to the same effect. There plaintiff sought the winding up of the business and injunctive relief, claiming among other things to be a joint adventurer in a business of manufacturing and selling corsets. As to the existence of a joint adventure the court said:

" . . . the idea of 'joint adventure' is here lacking, not because defendant owned the factories and the New York and other offices, and all other tangible assets, and himself paid all expenses of manufacturing and (for the most part) all other expenses of the business, but because appellant was paid as compensation for her services fixed commissions upon the gross sales, without reference to whether the business made a profit or suffered a loss, and thus whether or not there were any net or joint proceeds to divide." (Pg. 791)

See, also, *Columbia Laundry v. Hencken*, 203 App. Div. 140, 196 N. Y. Supp. 523 (1922); *Atlas Realty Co. v. Galt*,

153 Md. 586, 139 Atl. 285 (1927); *National Surety Co. v. Winslow*, 143 Minn. 66, 173 N. W. 181 (1919); *Griffiths v. Von Herberg*, 99 Wash. 235, 169 Pac. 587 (1917); *Coburn v. Davis*, 201 Iowa 1253, 207 N. W. 586 (1926); and *Jasper v. Bernstein*, 259 App. Div. 638, 20 N. Y. S. (2d) 362 (1940).

No other conclusion can be reached from Silverman's testimony than that he made an arrangement with appellee to the effect that he would not acquire a factory or himself bid on the ration token contract if appellee would increase its proposed bid to the Government by 15 per cent and would pay that 15 per cent to Silverman if its bid was accepted. The bid was submitted in appellee's name and appellant neither had nor assumed any obligation toward the Government. He was to be paid his part of the contract proceeds without regard for whether the results were successful. He had no control over the performance of the contract or over the facilities, materials or labor with which it was to be performed. He contributed no capital and had no joint interest in either losses or profits. Most of the recognized indicia of a joint enterprise are therefore lacking. Accordingly, the claim that a joint adventure was established should not be supported particularly since the underlying agreement alleged so clearly offends public policy.

(4) The Trial Court did not err in granting appellee's motion for summary judgment.

Appellant's brief does not clearly establish the grounds upon which he appears to contest the decision of the trial justice in entertaining appellee's motion for summary judgment under Rule 56.

As noted at the outset of the statement of facts, appellant's complaint was framed in most ambiguous language. It described the alleged contract which formed the basis of the suit only in vague generalities. The broad claim that the agreement concerned a joining of resources for the purpose of consummating a contract with the United

States was the merest conclusion, completely lacking in specification.

Appellee filed no affidavit of its own. It moved for summary judgment relying solely upon appellant's own deposition taken for purposes of discovery. As the statement of facts demonstrates, this deposition, by appellant's own admission and testimony, contained the full and complete account of the transaction and presented all the facts upon which the general assertions as to the nature and effect of the alleged agreement are allegedly founded.

Appellant has sought to confuse the clear issues raised by the facts as fully developed in his own deposition by filing an affidavit after the hearing on the motion. This paper, replete with argument and legalistic conclusions, was well described by the trial justice in his subsequent memorandum opinion in the following terms:

"Plaintiff, by presenting no additional *facts*, cannot be heard to qualify, explain or negative what he has admitted categorically by way of deposition. Mere denials are not sufficient." (App. 41)

No one can read appellant's affidavit without recognizing the complete absence of any new material facts. The affidavit does not even purport to be based entirely on personal knowledge. As a mere legalistic interpretation of the deposition it represents, as appellant has admitted, an effort to explain and qualify appellant's testimony, but it adds nothing to the facts developed, creates no issue of fact, and is entitled to no weight.

A motion for summary judgment is entirely appropriate when made on the basis of plaintiff's own deposition. *Burman v. Lemke Construction Company*, 80 U. S. App. D. C. No. 8877, May 14, 1945, 149 F. (2d) 827; *Engl v. Aetna Life Insurance Company*, 139 F. (2d) 469 (CCA 2d 1943). In the latter case judgment was given under Rule 56, the moving party relying upon depositions. The other party contended that judgment should not be entered because additional evidence would be presented at the trial.

The judgment was affirmed. The court reviewed the history of Rule 56 and said:

" . . . if one may thus reserve one's evidence when faced with a motion for summary judgment there would be little opportunity 'to pierce the allegations of fact in the pleadings' or to determine that the issues formally raised were in fact sham or otherwise unsubstantial. It is hard to see why a litigant could not then generally avail himself of this means of delaying presentation of his case until the trial. So easy a method of rendering useless the very valuable remedy of summary judgment is not suggested in any part of its history or in any one of the applicable decisions."

Piantadosi v. Loew's, Inc., 137 F. (2d) 534 (C. C. A. 9th 1943), is also in point. In this case, the motion for summary judgment was supported by affidavits. The plaintiff contested the motion with a counter-affidavit containing general denials which were inconsistent with detailed facts stated in one of the defendant's affidavits and supported by formal certificates. The motion for summary judgment was granted on the ground that the pleadings and affidavits on file raised no genuine issue of material fact, and that the defendant was entitled to judgment as a matter of law. This was affirmed, the court stating:

"Rule 56e of the Federal Rules of Civil Procedure . . . declares with respect to summary judgments that: 'Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.' Under this rule mere denials, unaccompanied by any facts which would be admissible in evidence at a hearing, are not sufficient to raise a genuine issue of fact.

"Aside from denials and inadmissible evidence, the papers on file herein show a license from Feist, Inc., to Loew's to use the copyrighted song. The affidavits of Sam Katz and Abe Olman allege a license by reason

of several letters between Feist, Inc., and Loew's, identify the letters, and indicate the genuineness of the signatures. Plaintiff, presenting no facts in support thereof, merely denies the existence of the license, thus raising no issue."

Fletcher v. Krise, 73 App. D. C. 266, 120 F. (2d) 809 (1941), *cert. den.* 314 U. S. 608 (1941), was a suit for attorneys' fees. A motion for judgment was filed under Rule 56 on the ground that Fletcher had been disbarred. Certified copies of the orders of disbarment were filed. Fletcher contended that the allegation of his disbarment must be taken as denied under the pleadings. The Court of Appeals, however, affirmed the judgment dismissing the case, saying:

"This argument, however, overlooks the purpose of Rule 56, which is to dispose of cases where there is no genuine issue of fact, even though an issue may be raised formally by the pleadings. See 3 Moore's Federal Practice, § 56.01. Along with the averment, appellee filed certified copies of the orders of disbarment entered by the court below, this court, the Supreme Court, the Virginia District Court, and the Court of Claims. If in this state of the record, appellant had desired to challenge the verity of the orders, he might have served and filed opposing affidavits under the express terms of Rule 56(c). His inability to do so left the case with no genuine issue on this point."

In this instance motion for summary judgment is founded upon plaintiff's own deposition and there are no statements of fact before the court except statements of plaintiff himself. In *Farrall v. District of Columbia Amateur Athletic Union*, 80 U. S. App. D. C. No. 9084, Feb. 25, 1946, this court held that an issue of fact remained and that motion for summary judgment accordingly did not lie where well pleaded facts in the complaint were contradicted only in part by defendant's affidavit. The court recognized, however, in that decision that, where averments in a complaint are mere conclusions or vague generalities without

specification, motions for summary judgment will lie where an answering affidavit asserts facts which are undisputed. *National War Labor Board v. Montgomery Ward & Co.*, 79 U. S. App. D. C. 200, 114 F. (2d) 528 (1944), *cert. den.* 323 U. S. 774 (1944); *Burman v. Lemke Construction Company*, 80 U. S. App. D. C. No. 8877, May 14, 1945, 149 F. (2d) 827. Clearly the rule must apply here, with even greater force, where plaintiff's own deposition rather than a defendant's affidavit must be taken to state the undisputed facts since no conflict can exist between plaintiff's deposition and the vague generalities of his own complaint. There can be no doubt from plaintiff's own statement as to the illegality of the contract, and thus it is unnecessary to decide whether plaintiff's deposition in all respects fully sets forth the minute details of the alleged arrangement. A motion for summary judgment in these circumstances was wholly proper.

CONCLUSION

The motion for summary judgment was properly brought under Rule 56 and there being no genuine issue as to any material fact, the action of the Trial Justice in dismissing the complaint on the ground appellant's claim was founded on a contract illegal and wholly void as against public policy should be sustained. The order granting summary judgment and dismissing the complaint should be affirmed.

Respectfully submitted,

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